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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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MANDEL BROTHERS, INC.

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INDEX

	Original	Print
Proceedings before the Federal Trade Commission	1	1
Complaint	2	1
Answer	23	5
Initial decision and order of Hearing Examiner, dated October 5, 1956	80	9
Final order of Federal Trade Commission, dated July 5, 1957	173	28
Opinion of the Federal Trade Commission	177	31
Excerpts from transcript of testimony	193	46
Testimony of Robert L. Camenisch—Direct	193	46
Testimony of Bernard B. Bernstein—Direct	220	62
Commission's Exhibit No. 1—Label	225	64
Commission's Exhibit No. 3—Facsimile of Mandel Bros. Sales Check	226	64
Commission's Exhibit No. 4—Sales slip to R. A. Nelson	227	65
Commission's Exhibit No. 12—Sales slip to J. Keesee	228	66

	Original	Print
Proceedings before the Federal Trade Commission—Continued		
Excerpts from transcript of testimony—Continued		
Commission's Exhibit No. 53—Sales slip to Mrs. C. Dittman	229	66
Respondent's Exhibit No. 1—Ticket identifying type of fur, origin, register number and item number	230	66
Proceedings in the U.S.C.A. for the Seventh Circuit	231	67
Opinion, Parkinson, J.	231	67
Judgment	237	72
Order denying petition for rehearing	238	73
Final decree	239	73
Excerpt from appendix to petitioner's brief—Statement pursuant to Rule 16(b) of the Rules of the United States Court of Appeals for Seventh Circuit	241	75
Order extending time to file certiorari	243	76
Clerk's certificate (omitted in printing)	244	
Order granting certiorari	245	77

[fols. 1-2] **BEFORE FEDERAL TRADE COMMISSION**

Docket No. 6434

In the Matter of MANDEL BROTHERS, INC., a corporation.

COMPLAINT—Issued October 27, 1955

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mandel Brothers, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent Mandel Brothers, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

Paragraph Two: Respondent is now and has been since, August 9, 1952, effective date of the Fur Products Labeling Act, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

Paragraph Three: Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act.

[fol. 3] Paragraph Four: Certain of said products were misbranded in that they were not labeled in accordance with

the Rules and Regulations promulgated under the Fur Products Labeling Act in the following respects:

(a) Required information was set forth in abbreviated form on labels in violation of Rule 4 of the aforesaid Rules and Regulations;

(b) Required information was mingled with nonrequired information on labels, in violation of Rule 29(a) of the aforesaid Rules and Regulations;

(c) Required information was set forth in handwriting on labels, in violation of Rule 29(b) of the aforesaid Rules and Regulations.

Paragraph Five: Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act.

Paragraph Six: Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced in accordance with the Rules and Regulations promulgated under the Fur Products Labeling Act in the following respects:

(a) Required information was set forth in abbreviated form on invoices in violation of Rule 4 of the aforesaid Rules and Regulations;

(b) Respondent failed to disclose the required item number on invoices in violation of Rule 40 of the aforesaid Rules and Regulations.

Paragraph Seven: Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain advertisements concerning said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act, and of the Rules and Regulations promulgated under said Act, and which advertisements were intended to aid and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

[fol. 4] Paragraph Eight: Among and including the advertisements as aforesaid, but not limited thereto, were ad-

vertisements of respondent which appeared in the October 3, 1953, issues of the "Chicago Sunday American," "Chicago Sunday Sun Times," and "Chicago Sunday Tribune" and the October 11, 1954, issue of the "Chicago Daily Tribune," all of which publications have wide circulation in the State of Illinois and in various other States of the United States.

By means of the aforesaid advertisements and through others of the same import and meaning, not specifically referred to herein, respondent falsely and deceptively:

(a) Misrepresented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondent, in the recent regular course of its business, in violation of Rule 44(a) of the aforesaid Rules and Regulations;

(b) Misrepresented by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44(b) and (c) of the aforesaid Rules and Regulations.

Respondent, making the pricing claims and representations referred to in subparagraphs (a) and (b) hereof, failed to maintain full and adequate records disclosing the fact upon which such claims and representations were purportedly based, in violation of Rule 44(e) of said Rules and Regulations.

Paragraph Nine: Respondent, in the course and conduct of its business has been and now is engaged in substantial competition in commerce with other firms, corporations, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

Paragraph Ten: The use by the respondent of the aforesaid false, misleading and deceptive statements and representations as alleged in Paragraph Eight hereof has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are in fact true and into the purchase of substantial quantities of respondent's fur products by reason of such erroneous and mistaken belief. As a

result thereof substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

[fol. 5] Paragraph Eleven: The aforesaid acts and practices of respondent, as herein alleged, were in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Paragraph Twelve: The aforesaid acts and practices of respondent, as herein alleged, were all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 27th day of October, A. D., 1955, issues its complaint against said respondent.

Notice

Notice is hereby given you, Mandel Brothers, Inc., respondent herein, that the 18th day of January, A. D., 1956, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, 226 West Jackson Boulevard, Chicago, Illinois, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after the service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a

statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by [fol. 6-22] the hearing examiner. In such answer, respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 27th day of October, 1955.

By the Commission.

Robert M. Parrish, Secretary.

[fol. 23] BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 6434

In the Matter of MANDEL BROTHERS, INC., a corporation

ANSWER—Filed January 11, 1956

Comes now the respondent Mandel Brothers, Inc., by its attorneys, and answers the complaint herein as follows:

1. Respondent admits the allegations in Paragraph One of the complaint.

2. Answering Paragraph Two of the complaint, respondent admits that it is now and has been since before August

9, 1952, engaged in Chicago, Illinois, in the sale, advertising and offering for sale of fur products as "fur products" is defined in the Fur Products Labeling Act (hereinafter sometimes referred to as the Fur Act). Respondent denies that it has been or is engaged in the introduction into commerce, or in the sale, advertising and offering for sale in commerce, or in the transportation and distribution in commerce, of fur products, as "commerce" is defined in the Fur Act. Respondent is without knowledge or information sufficient to form a belief as to whether, and therefore denies that, [fol. 24] said fur products were made in whole or in part of fur which had been shipped and received in commerce as that term is defined in the Fur Act.

3. Answering Paragraph Three of the complaint, respondent denies that said fur products were misbranded and denies that they were not labeled as required by the Fur Act.

4. Answering Paragraph Four, respondent denies that said fur products were misbranded and denies that they were not labeled in accordance with the Rules and Regulations promulgated under the Fur Act and denies that required information was set forth in abbreviated form on labels or that required information was mingled with non-required information on labels or that required information was set forth in hand-writing on labels.

5. Answering Paragraph Five, respondent denies that certain of said fur products were falsely and deceptively invoiced and denies that they were not invoiced as required under the provisions of the Fur Act.

6. Answering Paragraph Six, respondent denies that certain of said fur products were falsely and deceptively invoiced and denies that they were not invoiced in accordance with the Rules and Regulations promulgated under the Fur Act and denies that required information was set forth in abbreviated form on invoices and denies that it failed [fol. 25] to disclose the required item number on invoices.

7. Answering Paragraph Seven, respondent denies that certain of said fur products were falsely and deceptively advertised and denies that it caused the dissemination in commerce (as defined in the Fur Act) of certain advertisements concerning said fur products which advertisements were not in accordance with the provisions of the Fur Act

and of the Rules and Regulations promulgated thereunder.

8. Answering Paragraph Eight of the complaint, respondent admits that its advertising appeared in the October 11, 1954 issue of the Chicago Daily Tribune, but denies that any advertisements appeared in any issues of the Chicago Sunday American or the Chicago Sunday Sun Times or the Chicago Sunday Tribune dated October 3, 1953. Respondent is without knowledge or information sufficient to form a belief as to the geographic scope of the circulation of said newspapers. Respondent is without knowledge or information sufficient to form a belief as to advertisements designated in the complaint as "others of the same import and meaning, not specifically referred to herein" and therefore denies each and every of the complaint's allegations with respect thereto. Respondent denies that the aforesaid advertisement or advertisements falsely and deceptively misrepresented prices of fur products as having been [fol. 26] reduced from regular or usual prices and denies that the stated regular or usual prices were fictitious. Respondent denies that the aforesaid advertisement or advertisements falsely and deceptively misrepresented the amount of savings to be effectuated by purchasers of said fur products. Respondent denies that it failed to maintain full and adequate records disclosing the facts upon which were based the pricing claims and representations in the aforesaid advertisement or advertisements.

9. Answering Paragraph Nine, respondent admits and asserts that it is engaged in competition with others engaged in the sale of fur products to members of the purchasing public. Respondent denies that such competition is in commerce as defined in the Fur Act.

10. Answering Paragraph Ten, respondent denies that it used false, misleading or deceptive statements and representations as alleged in Paragraph Eight. Respondent denies that any of its actions have had or have the tendency and capacity to mislead and deceive any portion of the purchasing public in any wise. Respondent denies that any trade has been unfairly diverted to it from its competitors and denies that any injury has been or is being done to competition.

11. Answering Paragraph Eleven, respondent denies that any act or practice of respondent was in violation of the

[fol. 27] Fur Products Labeling Act or of the Rules and Regulations promulgated thereunder, and denies that any act or practice of respondent constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

12. Answering Paragraph Twelve, respondent denies that any act or practice of respondent was to the prejudice or injury of the public or of respondent's competitors, and denies that any act or practice of respondent constituted unfair or deceptive acts or practices or unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

13. Respondent denies, generally and specifically, each and every allegation contained in the complaint not hereinbefore admitted, qualified or denied.

14. Respondent denies that, at any time pertinent herein, it was engaged in commerce which, under the Constitution of the United States, the Congress is empowered to regulate, or in commerce which the Federal Trade Commission is authorized to regulate, or in commerce as that term is defined in the Fur Products Labeling Act or the Federal Trade Commission Act.

[fols. 28-79] Wherefore, respondent prays that the complaint be dismissed.

Hopkins, Sutter, Owen, Mulroy & Wentz. William G. Blood. James J. McClure, Jr., One North La-Salle Street, Chicago 2, Illinois. Samuel H. Horne, Munsey Building, Washington 4, D. C. Attorneys for Respondent.

Dated: January 11, 1956.

[fol. 80] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Initial Decision

In the Matter of MANDEL BROTHERS, INC., a corporation

INITIAL DECISION AND ORDER OF HEARING EXAMINER—October 5, 1956

Robert L. Piper, Hearing Examiner.

William A. Somers, Esq., for the Commission

Hopkins, Sutter, Owen, Mulroy & Wentz, by William G. Blood, Esq., and James J. McClure, Jr., Esq., of Chicago, Illinois, for respondent.

Statement of the Case

On October 27, 1955, the Federal Trade Commission issued its complaint against Mandel Brothers, Inc. (hereinafter called respondent), charging respondent with misbranding and falsely and deceptively invoicing and advertising certain fur products in violation of the provisions of the Fur Products Labeling Act (hereinafter called the Fur Act), 15 U.S.C. 69(a), *et seq.*, and Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint, together with a notice of hearing were duly served upon respondent.

The complaint alleges in substance that respondent (1) misbranded certain of its fur products by not labeling them as required under the Fur Act and the Rules and Regulations promulgated thereunder; (2) falsely and deceptively invoiced certain fur products in violation of the Fur Act [fol. 81] and said Rules and Regulations; (3) falsely and deceptively advertised certain fur products by misrepresenting the prices as having been reduced from regular or usual prices, and by means of comparative prices, as having a certain value, in violation of the Act, the Fur Act and Rules and Regulations; and (4) failed to maintain adequate records upon which such price and value representations were based, in violation of the Rules and Regulations. Respondent appeared by counsel and filed an answer admitting the

corporate and competition allegations of the complaint, but denying the jurisdictional allegations and all alleged violations of the Act, the Fur Act and the Rules and Regulations.

Pursuant to notice, hearings were thereafter held on April 12 and June 7, 1956, in Chicago, Illinois, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. Prior to the initial hearing, respondent's motion to strike the complaint upon the grounds that the Rules and Regulations promulgated by the Commission under the Fur Act were invalid, that the Fur Act was unconstitutional, that the complaint was so vague and uncertain as to make responsive pleading impossible, and that the complaint failed to allege sufficient facts concerning commerce to vest the Commission with jurisdiction, was denied.

All parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. All parties waived oral argument and pursuant to leave granted thereafter filed proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a corporation organized and existing under and by virtue of the laws of the State of [fol. 82] Delaware, with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

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[1] 5 U.S.C. § 1007(b)

II. Interstate Commerce and Competition

The complaint alleged, respondent denied, and it is found that respondent is now and has been since August 9, 1952, the effective date of the Fur Act, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce", "fur" and "fur products" are defined in the Fur Act.

In this connection, as noted above, respondent denies that it is engaged in commerce within the meaning of the Fur Act, or that it sold, advertised, offered for sale, transported or distributed fur products made in whole or in part of fur which had been shipped and received in commerce. However, the record establishes that respondent advertised its fur products in commerce, sold fur products to customers from outside the State of Illinois and subsequently delivered such products to such customers outside the State of Illinois, and purchased and had shipped to it in the State of Illinois fur products from the State of New York.

Respondent advertised its fur products in The Chicago Tribune, The Chicago American, and The Chicago Sun-Times, newspapers with substantial circulation outside the State of Illinois. In addition, the record reveals a number of sales by respondent to customers outside the State of Illinois. While these sales were made at the Chicago store, respondent's officials admitted that, because no Illinois sales tax was charged, the products must have been delivered by respondent to such customers outside the State of Illinois. The foregoing facts are substantially identical to those considered by the Commission in the *Pelta Furs* case,[2] wherein the Commission, although in disagreement concerning the authority for Rule 44 of the Rules and Regulations under the Fur Act, unanimously agreed that the respondents therein were engaged in "commerce" within the meaning of the Act and the Fur Act.

[fol. 83] Based upon the above undisputed facts, it is further concluded and found that respondent is engaged in

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[2] *Pelta Furs*, Docket No. 6297 (1956)

commerce within the meaning of the Act, and that, in the course and conduct of its business, respondent is in substantial competition in commerce with other corporations, firms, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

III. The Unlawful Practices

A. Misbranding of Fur Products

The complaint alleged that respondent misbranded certain fur products by not labeling them as required under the provisions of Section 4(2) of the Fur Act and Rules 4, 29(a) and 29(b) of the Rules and Regulations. More specifically, Section 4(2) of the Fur Act requires labels on fur products showing: (a) the name of the animal as set forth in the Fur Products Name Guide promulgated by the Commission pursuant to Section 7 of the Fur Act; (b) that the fur is used; (c) that the fur is bleached, dyed, or otherwise artificially colored; (d) that the product is composed of paws, tails, etc.; (e) the name or other identification of the person who manufactures or sells the product; and (f) the country of origin of any imported fur.

Counsel supporting the complaint proposed no findings, and there is no proof in the record, with respect to any violation of (b) and (d) above. Accordingly no such violations are found. With respect to (a), (c) and (f) above, there is no substantial dispute in the record. The record reveals some 12 instances of failure to label the fur products with the correct name of the animal producing the fur as set forth in the Fur Products Name Guide, some 15 instances of failure to disclose in the labels that the product was bleached, dyed or otherwise artificially colored, and some 58 instances of failure to disclose the country of origin of imported furs. With respect to the alleged violations of the aforesaid rules concerning labeling, the record establishes some 9 instances of required information being set forth in abbreviated form contrary to Rule 4, some 59 instances of mingling non-required information with required information in violation of Rule 29(a), and some 119 instances of required information being set forth in handwriting in violation of Rule 29(b).

While not disputing any of the foregoing violations, re-

spondent argues that they are merely technical and trivial in
[fol. 84] nature, and accordingly the public interest does
not warrant the issuance of a cease and desist order.

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

Although the complaint alleged, and counsel supporting the complaint proposed a finding, that respondent failed to attach labels to its fur products showing its name, as required by subsection (e) of Section 4(2) of the Fur Act as paraphrased above, the record establishes that respondent did not in fact fail to so label its products. Mr. Camenisch, an investigator for the Commission, testified that he found no instances where respondent's name was not set out on its labels. Commission Exhibit 1 is a facsimile of the form of label used by respondent. Printed thereon in large type are the words "Mandel Brothers, Chicago". Mr. Camenisch testified that the correct name of respondent is Mandel Brothers, Inc., and apparently the proposed finding of counsel supporting the complaint

is based upon the failure to include the word "Inc.", even though it is undisputed that respondent placed its name and city of location upon all of its labels. I find no merit in this proposal of counsel supporting the complaint. Subsection (e) of Section 4(2) requires that the label show plainly: "The name, or other identification issued and registered by the Commission, of one or more of the persons [fol. 85] who manufacture such fur product . . . , introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce." Respondent has complied with this requirement literally. In addition, it included the city where it does business, more information than necessary under the subsection. The failure to attach the word "Inc." seems to me completely without significance. Respondent plainly set forth the name under which it does business and its location. To construe the omission of Inc., which respondent does not normally use as a part of its name in doing business, as a violation of the Fur Act seems to me entirely too technical and unreasonable.

B. False Invoicing of Fur Products

The complaint alleged that respondent falsely invoiced certain of its fur products in violation of Section 5(b)(1) of the Fur Act and Rules 4 and 10 of the Rules and Regulations. Section 5(b)(1) requires that the invoices show: (a) the name of the animal as set forth in the Fur Products Name Guide; (b) the presence of used fur; (c) that the fur product is bleached, dyed or otherwise artificially colored; (d) that the fur product is composed of paws, tails, etc.; (e) the name and address of the person issuing the invoice; and (f) the country of origin of any imported fur. In support of these allegations, counsel supporting the complaint offered in evidence certain invoices issued by respondent to purchasers of its fur products. These contained four instances of failure to set forth the correct name of the animal as contained in the Fur Products Name Guide, and six instances of failing to set forth that the fur in the product was bleached, dyed or otherwise artificially colored. With respect to subparagraph (e) as set forth above, respondent's invoices show that, while its

name is set forth thereon, no address is included as required by subsection (e).

Counsel supporting the complaint proposed a finding of fact under subsection (d) above, but there is no evidence in the record that respondent's invoices ever failed to show that the fur products were composed of paws, tails, etc. when such was the fact, as required by subsection (d), and accordingly no such finding is made. Counsel supporting the complaint proposed no findings of fact with respect to subparagraphs (b) and (f) of Section 5(b)(1) as set forth above, and there is no proof in the record in support of these allegations. Accordingly, no finding will be made. With respect to the alleged invoicing violations of Rules 4 and 40 which provide respectively that required information not be abbreviated and that the invoice disclose [fol. 86] the item number of the fur product, counsel supporting the complaint proposed no findings of fact, there is no proof in the record to sustain such allegations, and no such findings are made.

C. False Advertising of Fur Products

The complaint alleged that respondent falsely and deceptively advertised its fur products in violation of the Fur Act, of Rules 44(a), (b) and (c), and of the Act, by newspaper advertisments which represented that the prices of its fur products had been reduced from their regular and usual prices when in truth and in fact such so-called regular or usual prices were fictitious, and by newspaper advertisements which represented that the sale prices of its products enabled purchasers to effectuate savings greater than the difference between such prices and current market value. Rule 44(a) prohibits such fictitious pricing and Rules 44(b) and (c) prohibit such comparative pricing and value claims unless based upon current market values or the time of such compared prices is given and such claims are true in fact. It is of course well established that such false representations in commerce concerning prices and value are violations of Section 5 of the Act.[3]

[3] *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

The record establishes that respondent by its newspaper advertising misrepresented its regular and usual prices, and misrepresented the market price or value of its fur products. Four newspaper advertisements of respondent were received in evidence, two from the Chicago Sun-Times and Chicago American on October 3, 1954, one from the Chicago Tribune on October 2, 1954, and the other from the Chicago Tribune on October 5, 1952.

1. The Comparative Pricing

The alleged misrepresentation concerning the market price or value of respondent's products is considered first. Respondent operated two fur departments in its Chicago store, one called the Subway Fur Department in the basement and the other on the fifth floor called the Fur Salon. Respondent annually each October conducts a sale in its Subway Department during which hundreds of fur coats, jackets and other garments are sold at a single price of $125.00 each. Respondent has been conducting this particular promotion for many years. The two advertisements [fol. 87] dated October 3, 1954, and the advertisement dated October 5, 1952, dealt with this particular annual sale of fur products. The 1954 advertisements contain a long list of fur garments of different types of furs with a corresponding list of market prices ranging from $195.00 to $499.00 each, all for sale at the single price of $125.00. The 1952 advertisement was substantially the same except that the market prices listed ranged from $165.00 to $599.00. In addition, the 1952 advertisement also stated that many of the fur products on sale were reduced from respondent's own stock.

The record establishes that the market price or value of the fur products advertised by respondents in 1952 and 1954 did not equal or approach $599.00 and $499.00, respectively. Commission Exhibits 25 through 46 are respondent's invoices showing sales made during the 1954 Subway Fur sale, together with the receiving aprons and manufacturers' invoices tied to each such sale invoice showing the original cost of each garment and also listing respondent's retail prices thereon as $125.00. These exhibits reveal that the cost of the fur products sold by respondent during the 1954 Subway sale ranged from $83.00 to approximately

$100.00 a unit. Commission Exhibits 55 through 60 are manufacturers' invoices of fur products purchased by respondent for its 1952 Subway sale and show costs ranging from $87.50 to $100.00 a garment. Counsel supporting the complaint called Messers. Himmel and Friedman, two experienced furriers engaged in the business in Chicago for many years, who both testified that the average mark-up in the fur industry was 60 per cent of the cost or 37½ per cent of the retail price. Mr. Friedman testified that the maximum range of mark-up was from 50 to 70 per cent of the cost. Respondent offered no evidence to contradict this testimony and accordingly it is undisputed in the record. Computing the maximum mark-up used in the industry, 70 per cent, upon the maximum cost of any of the garments listed in the foregoing exhibits would result in $170.00 as the highest market value of any of the fur products.

Messers. Hill and Bernstein were the buyers for and in charge of the Fur Salon and the Subway Department, respectively. They testified that they made frequent buying trips to New York City and, by careful shopping and buying in lots rather than individual pieces, were able to acquire fur products at prices substantially less than they could be purchased by competitors in single units.

Messers. Hill and Bernstein also testified that the market prices listed in the three advertisements above mentioned were true and correct. For a number of reasons, this testimony cannot be credited. Based upon this and proof [fol. 88] that respondent's mark-ups averaged from 5 to 10 per cent less than the usual mark-up of 37½ per cent of retail price, respondent argued that the market prices contained in its advertisements were in fact correct. While this would result in lower prices to the public, as contended, it by no means establishes the truth of the market value representations. As heads of the respective departments, Messers. Hill and Bernstein either prepared or supervised the preparation of respondent's newspaper advertisements. Self-interest would dictate that they testify that such advertisements were true and correct in all respects. More conclusively, the facts established by the documentary evidence in the record reveal that the market values listed in the advertisements could not possibly have been true.

As previously noted, a maximum mark-up applied to the fur products, costing the most would have resulted in a market price of only $170.00. Based upon the highest cost of the fur products, a mark-up of 400 to 500 per cent would have been necessary to reach the market prices of $499.00 and $599.00 listed in respondent's advertisements. In view of the testimony of Messers. Himmel and Friedman, both of whom had many years of experience in the fur business and were president and secretary, respectively, of the Associated Fur Industries of Chicago, such a mark-up would be incredible.

The argument that because respondent purchased its fur products in lots or large quantities it was able to secure them at cost prices 400 to 500 per cent below market value is equally incredible. With regard to this, it will be noted that both Messers. Hill and Bernstein testified that they were able to purchase such products at a cost considerably lower than buying each garment individually. Respondent's argument assumes that competitors could buy fur products only as individual items, an assumption which obviously is not sound. Mr. Himmel testified that his firm operated the largest exclusive fur building in Chicago and was also engaged in manufacturing. The market price or value of a product must be the average price at which such products are sold in the industry at retail. Here this necessarily means the price at which competitors of respondent were selling such products on the retail market in Chicago. To assume that such competitors could and did purchase their fur products wholesale only individually or in small units instead of lots could hardly be accurate, yet this is the tenor of respondent's argument.

Actually, respondent's invoices demonstrate the invalidity of this argument. An examination of them reveals that, contrary to its contention concerning buying in quantity, the lowest cost prices appear on the invoices involving the smallest number of fur products. For example, Com- [fol. 89] mission Exhibit 29 involving the purchase of eight garments to be sold for $125.00 shows the cost thereof to be $84.00 a piece. Similarly, Exhibits 40, 42, and 44, involving the purchase of only 14, 17 and 21 garments, respectively, shows the cost to be $83.00 per garment. Conversely, many of the invoices covering a purchase of

substantially larger numbers of fur garments show a higher cost per item. It can hardly be contended seriously that respondent's competitors, including the largest exclusive furrier in Chicago, could not purchase lots of fur garments wholesale in quantities ranging from 8 to 21. In view of these established facts, respondent's advertised market prices representing a mark-up of 400 to 500 per cent above cost cannot be true.

Another point worth noting in this connection is that if respondent's market prices or values of $499.00 to $599.00 were correct, the cost of such products to respondent's competitors must have ranged from approximately $300.00 to $350.00 per unit, and they could have effectuated great savings and substantial profits merely by purchasing such garments from respondent for $125.00 during its sale. Respondent also argued that there was no proof in the record that the garments identified by invoice were those advertised. Actually the converse is true. Mr. Bernstein testified that respondent never used the $125.00 price except during its Annual sale, and hence the identified garments must have been those advertised. For all of the foregoing reasons, it is concluded and found that respondent's representations concerning the market price or value of its fur products listed in the foregoing advertisements were false.

2. The Fictitious Pricing

The complaint also alleged that respondent falsely represented its usual and regular prices of such products. The proof in support of this allegation was the representations made in the advertisement in The Chicago Tribune dated October 2, 1954, Commission Exhibit 47. This advertisement dealt with a sale of fur products by respondent in its Fur Salon. It stated that the fur products on sale at $244.00 were "Usually $299.00 to $399.00." This interpretation is corroborated by the testimony of Mr. Camenisch, who contacted Mr. Hill with respect to this advertisement and asked him if he could point out the particular garments advertised. According to Mr. Camenisch, Mr. Hill replied that he had no definite record of the particular garments but suggested that Mr. Camenisch check the sales records to find any garments sold at that price pursuant to the advertisement to ascertain the validity of the claims made therein. If it be

[fol. 90] contended that the advertisement was a representation of market value rather than respondent's usual and regular prices, Mr. Hill, who prepared the advertisement and was contacted by Mr. Camenisch, could have at that time made that fact clear. Instead, however, Mr. Hill suggested that Mr. Camenisch check respondent's sales records to locate any particular garments sold by it pursuant to that advertisement. This testimony was undenied although Mr. Hill testified on two occasions. It seems clear, therefore, in addition to the wording of the advertisement itself, that respondent was representing and intended to represent that the usual and regular prices of these products were from $299.00 to $399.00.

Mr. Camenisch proceeded to check the sales records and found three sales invoices of garments sold pursuant to that advertisement. Such sales invoices and the corresponding manufacturers' invoices of the particular garments were received in evidence. The manufacturer's invoices show that at the time respondent purchased these garments it priced them for sale at retail at $244.00, $244.00 and $288.00, respectively. Respondent's officials testified, and it was undisputed, that in connection with all of the manufacturers' invoices and receiving aprons received in evidence, respondent entered thereon its retail price to be charged for the particular garments and such price was not thereafter changed. This demonstrates that the garments sold were not usually and regularly priced by respondent for sale at from $299.00 to $399.00. Accordingly, it is concluded and found that respondent, by the above advertisement concerning the sale in the Fur Salon, falsely represented its usual and regular prices of such products.

3. The Failure to Maintain Records Concerning Pricing Claims and Representations

The complaint also alleged that respondent failed to maintain full and adequate records disclosing the facts upon which the pricing claims and representations discussed above were based, in violation of Rule 44(e). Rule 44(e) provides that persons making pricing claims or representations of the types described in subsection (a), (b) and (c) thereof, namely, fictitious and comparative pricing, must maintain full and adequate records disclosing the facts upon

which such claims or representations are based. Mr. Camenisch testified that he asked both Messrs. Hill and Bernstein for such records but that none were produced or available, and that respondent's inventory records indicated that the garments advertised never had such value or price, as previously found herein. This testimony was undisputed and accordingly it is found that respondent failed to maintain the records supporting its pricing claims required by Rule 44(e).

[fol 91] D. Respondent's Contentions and Defense

Respondent's contention concerning the triviality and technicality of its labeling violations, and its contention with respect to interstate commerce within the meaning of the Act and the Fur Act, have previously been considered herein. In addition, respondent contended that the requirements of the Fur Act with respect to invoicing do not apply to a person engaged in the retail sale of fur products because of the definition of "invoice" in Section 2(f). This section provides that: "The term 'invoice' means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person *who is engaged in dealing commercially in fur products or furs.*" (Emphasis supplied by respondent.)

Because of the italicized portion of the foregoing definition, respondent contends that the term "invoice" applies only to wholesalers, manufacturers and jobbers, but not to retailers. The gist of respondent's argument is that because of the foregoing language an invoice as defined can apply only to a purchaser who is engaged in dealing commercially in fur products or furs. Such a construction of Section 2(f) appears far too limited in view of the undisputed purpose of the Fur Act to protect the ultimate consumer from deception by false invoicing. It is clear that the Commission has not so construed the meaning of invoice under Section 2(f). The various rules and regulations adopted by the Commission dealing with invoicing clearly indicate that the Commission considers the invoicing requirements of the Act applicable to retailers of fur products

who sell to the purchasing public. In addition, decisions of the Commission, including the *Pelta Furs* case,[4] establish that the Commission has applied the invoicing requirements of the Act to retailers selling fur products to the public.

Respondent also argued that Rule 44 is *ultra vires* as an unwarranted extension of the power delegated to the Commission by the Fur Act. This identical issue was considered by the Commission in the *Pelta Furs* case,[5] in which the Commission held that Rule 44 was an appropriate exercise of the Commission's power under Sections 8(b) and 5(a)(5) of the Fur Act. Respondent also contended that Rule 44 cannot operate to shift the burden of proof to respondent. Apparently this contention is based upon respondent's [fol. 92] belief that there is no proof in the record to sustain the allegations of fictitious and comparative pricing, and that therefore the position of counsel supporting the complaint must be that respondent is required to show that its alleged fictitious and comparative prices were in fact not fictitious and were in fact true market values, respectively. Of course respondent's contention that Rule 44 cannot operate to shift the burden of proof to it is correct. However, no such position was taken by counsel supporting the complaint, and the record does not support respondent's belief. As previously found, counsel supporting the complaint established by reliable, probative and substantial evidence that respondent's pricing representations were in fact false and fictitious. The burden of proof to establish any alleged violation of the Act or the Fur Act is always upon counsel supporting the complaint, and in this proceeding counsel has clearly met that burden.

The fact that Rule 44(e) requires persons making price representations to maintain records supporting such representations does not operate to shift the burden of proof to such persons. Obviously, proof that a respondent did not maintain such records, while it would establish a violation of Rule 44(e), would not be sufficient to establish a violation of Rule 44(a), (b), or (c), and the burden of proving that a respondent's price representations were in fact fictitious or false would still be upon counsel supporting the complaint.

[4] See Footnote 2, *supra*.

[5] See Footnote 2, *supra*.

The record establishes the pricing allegations of the complaint and accordingly respondent's argument in this respect is without merit.

E. Concluding Findings

As previously found, there is no evidence in the record that respondent misbranded its fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, etc., or the name of the person selling, advertising, transporting, or distributing such products in commerce, as alleged in the complaint, nor was there any evidence in the record that respondent falsely invoiced its fur products by failing to show thereon that the fur was used, that the fur was composed of paws, tails, etc., or the country of origin of any imported furs, or by abbreviating required information or failing to disclose the required item number, as alleged in the complaint. Accordingly, it is found that there is no substantial evidence in the record to support the foregoing allegations of the complaint.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, [fol. 93] and accordingly, it is found, that respondent misbranded certain of its fur products by failing to affix labels thereto showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) The name of the country of origin of any imported furs used in the fur product; and

(c) That the fur product contained or was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

It is further concluded and found that respondent falsely and deceptively invoiced fur products by failing to furnish invoices to purchasers showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) That the fur product contained or was composed of bleached, dyed, or otherwise artificially colored fur when such was the fact; and,

(c) The address of the person issuing such invoices.

It is further concluded and found that respondent falsely and deceptively advertised fur products by the use of advertisements and representations which were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of such products, and which represented, directly or by implication, that (1) its sale prices were reduced from the regular or usual prices of its fur products, when in truth and in fact such represented regular and usual prices were in excess of the prices at which respondent had usually and customarily sold such products in the recent regular course of its business; and (2) its sale prices enabled purchasers of its fur products to effectuate [fol. 94] savings greater than the difference between the stated price and the current market price of such products, in violation of both the Fur Act and the Act.[6]

It is further concluded and found that respondent, in making the pricing claims and representations hereinabove found, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of the Rules and Regulations.

F. The Effect of the Unlawful Practices

The use by respondent of the false, misleading and deceptive statements and representations found above in Section III, Cl. 2 and E has had and how has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public and thereby induce the purchase of substantial quantities of respondent's fur products. As a result, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

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[6] While the Commission disagreed concerning the validity of Rule 44 under the Fur Act in the *Pelta Furs* case, *supra*, it unanimously held such practices to be in violation of Section 5 of the Act.

Conclusions of Law

1. Respondent is engaged in commerce, and engaged in the above found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and in the Fur Act.

2. The acts and practices of respondent hereinabove found are in violation of the Fur Act and the Rules and Regulations promulgated thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Act.

3. The acts and practices of respondent found in Section III C1, 2 and E are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair [fol. 95] methods of competition and unfair and deceptive acts and practices within the intent and meaning of the Act.

4. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondent.

5. Respondent has not, as alleged in the complaint, violated the Fur Act or the Rules and Regulations by misbranding fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, bellies or waste fur, or respondent'se name, or falsely invoiced fur products by failing to show that the fur was used, that the fur was composed of paws, tails, bellies or waste fur, the country of origin of imported furs, the required item number, or by abbreviating required information.

Order

It Is Ordered that respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of fur products in commerce, as "commerce" is defined in the Federal Trade Commission Act, or in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and

received in commerce, as "commerce" "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

[fol. 96] A. Misbranding fur products by failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact; and

(c) The name of the country of origin of any imported furs used in the fur product.

B. Setting forth, on labels attached to fur products:

(a) Non-required information mingled with required information; and

(b) Required information in abbreviated form, or in handwriting.

C. Falsely or deceptively invoicing fur products by failing to furnish invoices to purchasers showing:

(a) The name or names of the animal or animals pro-[fol. 97] ducing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact; and

(c) The name of the country of origin of any imported furs used in the fur product.

D. Falsely or deceptively advertising fur products, through the use of any notice, advertisement, or public announcement which does or is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication:

(1) By the use of the word "usually" or in any other manner, that the regular or usual price of any fur product

is any amount in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

(2) The savings to be effectuated by purchasers, by means of percentage savings claims or comparative prices, [fols. 98-172] unless such claims or prices are based upon the current market value of the fur product or upon a bona fide compared price at a designated time.

E. Making pricing claims or representations of the type referred to in paragraphs C (1) and (2) above unless respondent maintains full and adequate records disclosing the facts upon which such claims or representations are based.

It Is Further Ordered that the allegations of the complaint that respondent misbranded fur products by failing to affix labels thereto showing that the fur was used, that the fur was composed of paws, tails, etc., and the name of the person who sold, advertised, transported, or distributed such products in commerce; and that respondent falsely and deceptively invoiced fur products by failing to furnish invoices showing that the fur was used, that the fur was composed of paws, tails, etc., the country of origin of imported furs, the required item number, and by setting forth required information in abbreviated form be and hereby are, dismissed.

ROBERT L. PIPER,
Hearing Examiner.

October 5, 1956.

[fol. 173] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait.

In the Matter of MANDEL BROTHERS, INC., a corporation

FINAL ORDER—July 5, 1957

Respondent and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision filed October 9, 1956, and the matter having come on to be heard by the Commission upon the whole record, including briefs and oral argument, and the Commission having rendered its decision granting in part and denying in part the appeal of respondent and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

It Is Ordered that Paragraph 5 of the conclusions of law contained in the initial decision be modified to read as follows:

"5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information."

[fol. 174] It Is Further Ordered that the following order be, and it hereby is, substituted for the order contained in the initial decision:

"It Is Ordered that respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives,

agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as 'commerce,' 'fur' and 'fur products' are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

"A. Misbranding fur products by:

"1. Failing to affix labels to fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur products is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

[fol. 175] "(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and

"(f) The name of the country of origin of any imported furs used in the fur product.

"2. Setting forth on labels attached to fur products:

"(a) Required information in abbreviated form or in handwriting;

"(b) Non-required information mingled with required information.

"B. Falsely or deceptively invoicing fur products by:

"1. Failing to furnish invoices to purchasers of fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

[fol. 176] "(e) The name and address of the person issuing such invoices;

"(f) The name of the country of origin of any imported furs contained in the fur product.

"2. Setting forth required information in abbreviated form.

"3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

"C. Falsely or deceptively advertising fur products, through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

"D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based."

It Is Further Ordered that the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that the respondent, Mandel Brothers, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in wrting, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission. Commissioner Tait concurring in the result.

Robert M. Parrish, Secretary.

Issued: July 5, 1957.

[fol. 177] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait

In the Matter of MANDEL BROTHERS, INC., a corporation.

OPINION OF THE COMMISSION—July 5, 1957

By Anderson, Commissioner:

Respondent has appealed from the hearing examiner's initial decision which found that it had violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder in that, in certain respects, it had misbranded, falsely invoiced, and falsely advertised fur products sold by it. Respondent's appeal essentially is to the effect (a) that the Commission lacks jurisdiction and (b) that Rule 44 of the Fur Regulations is *ultra vires* the Commission's powers under the Fur Act. Respondent also questions whether the evidence supports the findings as to misbranding, false invoicing and false advertising.

Counsel in support of the complaint have also appealed, questioning the limited scope of the order to cease and desist in the initial decision insofar as the prohibitions against misbranding and false invoicing are concerned. They deem the order to be satisfactory insofar as the advertising violations are concerned.

Respondent's first contention, in effect, is that the evidence does not support the finding that respondent, Mandel

[fol. 178] Brothers, Inc., is subject to the Commission's jurisdiction under the Fur Act and the Federal Trade Commission Act. Under Section 3(a) of the Fur Act, the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced within the meaning of the Fur Act or the rules and regulations promulgated thereunder is unlawful and is an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. Section 4 of the same Act provides that for the purposes of the Act a fur product shall be considered to be misbranded if there is not affixed thereto a label showing the proper name of the animal producing the constituent fur; that it contains used fur, when such is the fact; that it contains bleached, dyed, or otherwise artificially colored fur, when such is the fact; that it contains paws, tails, bellies or waste fur, when such is the fact; the name or other identification of the person who manufactured it for introduction into commerce, who introduced it into commerce or who sells, advertises or offers it for sale, or transports or distributes it in commerce; and the name of the country of origin of the constituent fur; and Sections 5(a) and (b), respectively, provide that for the purposes of the Act a fur product shall be considered to be falsely or deceptively advertised or invoiced if the advertising or invoices do not show substantially the same information. Section 8 of the Fur Act, among other things, authorizes and directs the Federal Trade Commission to prevent violations of Section 3 by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were made a part of the Fur Act.

As will hereinafter appear, the record discloses that respondent misbranded, falsely invoiced, and falsely advertised fur products sold by it. The record further discloses that respondent advertised and offered for sale in commerce fur products through the recognizedly interstate media of The Chicago Tribune, The Chicago American and The Chicago Sun-Times, newspapers with substantial

circulation outside the State of Illinois. Furthermore, the record shows a number of instances where respondent shipped and delivered, or introduced into commerce, fur products sold to customers outside the State of Illinois. In [fol. 179] this latter connection, the hearing examiner found, in effect, that respondent's officials admitted such interstate sales because customer invoices showed that no Illinois sales tax was charged. Thus, the factual evidentiary situation in this regard is substantially the same as that which obtained in *Jaques De Gorter and Suze C. De Gorter, trading as Pelta Furs* v. *F.T.C.* (C. A. 9, decided April 17, 1957), and we conclude that the principles enunciated there are controlling here and that respondent's contentions as to the jurisdiction of the Commission are without merit.

Considering now respondent's second principal contention, namely, that Rule 44 of the Fur Regulations prohibiting price misrepresentations with respect to fur products is an unwarranted extension of power delegated to the Commission pursuant to the Fur Act, it is the opinion of the Commission that this point should be, and it hereby is, decided adversely to respondent—also for the reasons stated in the *Pelta Furs* case, *supra* where the Court, upholding, in effect, the Commission's opinion that Rule 44 is a valid, substantive regulation with the full force and effect of the statute itself, held:

> "By applying the principles in the cases just cited, and taking into account the legislative history of the Act, it is quite evident that the intention was to reach *all misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion [Emphasis by the Court.]

Finally, as indicated above, respondent attacks the sufficiency of the evidence to support findings in the initial decision as to misbranding, false invoicing and deceptive advertising.

Respondent does not dispute that it has violated the [fol. 180] *labeling* requirements of the Fur Act and the rules

and regulations promulgated thereunder.[1] It contends, however, that the instances of violation were merely technical and too trivial in nature to warrant a cease and desist order in the public interest. On this subject, the hearing examiner found as follows:

> "Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.
>
> "In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though [fol. 181] it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To

[1] In fact, respondent lists in its brief on appeal some seven pages of more than one hundred instances of admitted misbranding. These encompassed failure to use proper names of constituent furs, failure to properly show country of origin and that fur was dyed or artificially colored, improper use of abbreviations, the mingling of non-required with required information and labeling containing information in handwriting. Some of these are in direct contravention of the statute; others are in violation of rules and regulations promulgated under the Act, which are by statute also misbranding. (See *Peita Furs v. F.T.C.*, *supra*.)

dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act."

The statute does not establish or specify any criteria to permit differentiation between the trivial or serious nature of instances where a retailer fails to affix a label to fur products disclosing, in the manner and form contemplated, all of the information required by the Fur Act and rules and regulations promulgated thereunder. When alleged practices of a retailer are found to constitute violations of the statute, the Commission is under an obligation to correct them. In the circumstances of record in this proceeding, the Commission has concluded that the hearing examiner's finding in the respect indicated is entirely proper and correct. The reasons urged by respondent against sustaining such finding are without merit.

On the question of *false invoicing*, the hearing examiner found four instances of failure to state the correct name of the animal producing the fur contained in respondent's fur products and six instances of failure to set forth on invoices to customers that a fur product was bleached, dyed or otherwise artificially colored. He also found that respondent's invoices, while setting forth its trade name, do not include its address, as required by Section 5(b)(1) of the Act.

Respondent contends that these findings as to false invoicing should not be sustained. It does not seriously question that its sales slips are deficient in that they fail to show the name of the animal producing the fur, or that such slips do not carry respondent's address. It does question the sufficiency of the evidence to establish the fact that the fur products to which the sales slips related were actually dyed, bleached or artificially colored.

Considering this latter point first, sales slips in evidence show sales of fur products made of muskrat and black [fol. 182] Persian lamb unaccomanied by a statement that they are dyed. There is uncontroverted testimony that furs made of the skins of muskrat and black Persian lamb are always dyed. Respondent's argument that this finding as to false invoicing, with respect to bleached, dyed,

or artificially colored fur, should be stricken is without merit.

On the question of failure to show respondent's address on sale slips, it is the position of respondent that the omission is of such trivial character as not to require corrective action by the Commission. Counsel supporting the complaint point to the express provision of Section 5(b)(1)(E) of the Fur Act which requires invoices to show:

> "(E) the name and *address* of the person issuing such invoice. . ." [Emphasis supplied.]

In the face of this statutory directive, the hearing examiner could not find otherwise than he did in this connection. In Section 2(f) of the Act, the term "invoice" is defined to mean:

> "* * * a written account, memorandum, list or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs."

Respondent's main contention in justification of its false and deceptive invoicing practices is that the requirements of the Fur Products Labeling Act respecting invoicing are inapplicable to transactions involving the retail sale of fur products. Holding in effect that the construction advocated by the respondent misconstrues the impact of the word "other" in the context above, the hearing examiner rejected respondent's argument, and correctly so. The Commission has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer. That a prime purpose of the Act was to eliminate [fol. 183] deceptive invoicing at the consumer level is evident from its title, namely, "To protect consumers and others * * * against * * * false invoicing of fur products and furs." To accept the construction advanced by the respondent clearly would defeat the congressional declar-

ation of purpose and render the Act ineffective in a major respect.

In the latter connection, it should be noted that the retailer's memorandum of sale or invoice constitutes documentary evidence of rightful possession by the consumer of her fur garment, a factor obviously conducive to preservation of the invoice. This consideration is not applicable, however, with respect to the garment label. Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act.

Not only is the interpretation advocated by the respondent in conflict with the Act's avowed purpose and the legislative design underlying the invoicing provision, but such a construction ignores the language arrangement of Section 2(f) itself. The words "or agent" prefacing the phrase "or any other person who is engaged in dealing commercially in fur products" are set off from the preceding and succeeding parts of the sentence by commas. Hence, the words "or agent" comprise a separate and integral phrase in their own right. It accordingly seems reasonable to conclude that the final phrase extending the definition of invoice to memoranda issued to commercial dealers generally was intended to augment and expand the kindred class of persons dealt with in the preceding phrase, namely, agents.

Another consideration detracting from the force of the respondent's argument is the fact that sub-section (b) of Section 3 of the Act not only proscribes misbranding and false advertising but false invoicing as well. Subsection (a) similarly forbids misbranding and false and deceptive advertising and invoicing, but its proscriptions relate only to interstate aspects of the marketing and distribution of fur products and furs. Subsection (b) confers jurisdiction over fur products made in whole or in part of fur which has been [fol. 184] shipped and received in commerce, and clearly reaches deception engaged in at the local or intra-state level, the prime point of retail sales' consummation. The inclusion in this subsection of the provision against false invoicing is similarly suggestive of a legislative purpose

that the Act's invoicing requirements be applicable to retail transactions.

Respondent further submits that "it would be an unworkable burden on the retailer at a time of an extensive sale with many inexperienced sales persons on the floor to require each of them to have the detailed and intimate knowledge of the Fur Act * * *" necessary to enter the information required by Section 5(b) of the Act on the invoice, or sales slip, delivered to each customer. The answer to this contention is that such sales person is not required to have any specialized knowledge properly to complete the sales slip. The information can be copied by the sales person directly from the required label attached to the fur product. It is no more, and in fact is less, burdensome on a retailer than on a wholesaler, whose clerical personnel may have no physical contact with the merchandise or labels on merchandise being shipped to meet invoicing requirements of the Act. Respondent's contention that invoicing requirements of the Fur Act and rules and regulations promulgated thereunder do not apply to retail transactions is rejected.

Finally, respondent contends that the evidence does not support the hearing examiner's finding that its advertising of fur products contained false and fictitious statements. The complaint in this respect charges that respondent (1) misrepresented prices of fur products as having been reduced from regular or usual prices in that the regular or usual prices set forth in advertisements in fact were not the prices at which the merchandise was usually sold by respondent in the recent regular course of business, and (2) misrepresented by means of comparative prices and other statements as to "value" the amount of savings to be effectuated by purchasers.

As to (1)—the fictitious pricing charge—the record shows, and the hearing examiner found, that respondent placed an advertisement in The Chicago Tribune of October [fol. 185] 2, 1954, which stated that fur products offered at a price of $244.00 were "Usually $299.00 to $399.00." The record also discloses that it was respondent's customary and usual practice (never deviated from) to enter on manufacturers' invoices, at the time of receipt of merchandise, the intended regular and usual retail prices which, according to the testimony of respondent's buyers, always were

observed. Manufacturers' invoices introduced into evidence herein, and concerning which the same buyers also testified, showed as usual and regular retail prices, amounts of $244.00 or $288.00, not the prices stated in the advertisement as "Usually $299.00 to $399.00." Mr. Camenisch, a witness called in support of the complaint, identified, and testified as to, respondent's invoices furnished to customers on or about the date of The Herald Tribune advertisement. His testimony was that, through identifying stock item numbers appearing on those customer invoices, he traced the particular merchandise involved through respondent's records back to the manufacturers' invoices previously mentioned. He thus established that certain garments sold during the sale for $244.00 were the same garments advertised. This testimony and evidence clearly establishes the relationship of the sales and advertising in question. The net effect of respondent's use of "fictitious" prices such as the above-quoted "Usually $299.00 to $399.00," in the opinion of the Commission, was to mislead and deceive purchasers as to the amount of savings to be realized if advantage were taken of the sale price of $244.00. The evidence fully substantiates the hearing examiner's finding that respondent did engage in fictitious pricing. Respondent's contention on this point, therefore, is rejected.

As to (2)—the comparative pricing charge—the respondent is alleged to have misrepresented the amount of savings possible to a prospective purchaser by stating in advertisements that fur products featured therein had a stated "market value" or "market price" when such stated value, or price, was not true in fact.

The hearing examiner found that the market value or price stated by the respondent in its advertisements exceeded considerably the actual market value or price of [fol. 186] the fur products offered. This finding is based on his analysis of respondent's invoices of sales made, together with manufacturers' invoices, showing costs to respondent, to which are attached "receiving aprons" on which had been made notations of the retail price of the advertised garments to be $125.00.

Of the above-mentioned manufacturers' invoices, Commission Exhibits 25 through 46, covering the 1954 Subway store sale, show costs of garments to respondent ranging

from $83.00 to $100.00; Commission's Exhibits 55 through 60, covering the 1952 Subway store sale, show costs to respondent ranging from $87.50 to $100.00 per garment. There is expert testimony that maximum mark-up usually would range from 50 to 70% of cost. Using that range of mark-up on respondent's unit costs of record, the hearing examiner reasoned, would result in $170.00 as the highest market value of any of the fur products—not the market value or price placed upon them by respondent in its advertisements as ranging from $195.00 to $499.00 in 1954 and from $165.00 to $599.00 in 1952. Also, the hearing examiner found that, "Based upon the highest cost of the fur products, a mark-up of 400 to 500 per cent would have been necessary to reach the market prices of $499.00 and $599.00 listed in respondent's advertisements." The hearing examiner further found that such a mark-up would be incredible. He found equally incredible respondent's argument that because it purchased in lots and quantities, it was able to secure cost prices 400 to 500 per cent below market value.

This reasoning of the hearing examiner, while cogent, does not establish to the satisfaction of the Commission that the respondent misrepresented, by means of comparative prices and other statements as to "value," the amount of savings to be effectuated by purchasers. In order to make such a finding, it is obviously necessary to first find what the actual market value, or price, of the fur products [fol. 187] involved in this proceeding in fact was. There is no evidentiary basis on the record here to make such a determination. All that this record does show is what respondent's costs were, the usual and customary trade mark-up in the Chicago area and the retail prices at which respondent sold fur products. In view of the lack of evidence establishing actual market value, the Commission cannot accept the reasoning of the initial decision as establishing the conclusion that respondent did, in fact, misrepresent savings to be effectuated by prospective purchasers of fur products advertised and sold by it. It follows that the charge in the complaint to the effect that respondent misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of respondent's fur products has not been sub-

stantiated. The initial decision will be modified accordingly.

Turning now to a consideration of the appeal of counsel supporting the complaint, their appeal is limited to challenging the scope of the initial decision's order to cease and desist. Counsel contend, in such connection, that the hearing examiner erred in failing to require the respondent to comply with all labeling and invoicing requirements, respectively, prescribed in Sections 4(2) and 5(b)(1) of the Act. The allegations of the complaint in Paragraphs 3 and 5 are that certain of the respondent's fur products were misbranded and falsely invoiced in that they were not labeled or invoiced as required by these sections.

Under Section 4(2) of the Fur Products Labeling Act, a fur product is misbranded if it does not have affixed to it a label showing in words and figures which are plainly legible:

> "(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act; [fol. 188] "(B) that the fur product contains or is composed of used fur, when such is the fact;
>
> "(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;
>
> "(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
>
> "(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;
>
> "(F) the name of the country of origin of any imported furs used in the fur product."

With slight variation, the information prescribed by Section 5(b)(1) for inclusion on invoices to avoid falsity is the same.

With respect to the charge of misbranding in violation of Section 4(2), the record discloses numerous instances of

the respondent's failure to label its fur products with the correct name of the animal producing the constituent fur. Also, there were about 15 occasions when the respondent neglected to disclose on labels attached to its garments the fact that they were composed of dyed, bleached or otherwise artificially colored furs. In addition, we note numerous cases of failure adequately to disclose on labels the required information as to the country of origin of the component furs of the respondent's garments. The evidence shows, however, that the respondent's labels did carry in large type print the words "Mandel Brothers, Chicago," and this we regard to be in substantial compliance with the subsection's requirement for identification of the seller.

[fol. 189] The initial decision's findings generally reflect the foregoing, and similarly recognize that no instances were shown in which the respondent's labels were legally deficient through failure to reveal matters concerning the presence of used fur or paws and tails or relating to the seller's identity. A generally similar situation prevails as to some of the items of information on invoices. The order contained in the initial decision is limited to requiring cessation of the labeling and invoicing deficiencies found, and omits any provision making it mandatory for the respondent to likewise observe the other affirmative requirements of either Section 4(2) or 5(b)(1).

The Fur Products Labeling Act expresses a national policy against misbranding and false invoicing of fur products. Under the Act, a fur product is misbranded and the introduction, or manufacture of it for introduction, into commerce, or the transportation, or distribution of it in commerce, or the sale, advertising, or offering of it for sale in commerce is unlawful, unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4(2), and is falsely invoiced unless there is issued, in connection with its sale, an invoice which incorporates each of the statements of the nature contemplated by Section 5(b)(1). The violations with which the subsections are concerned consist of the failure to attach to a fur garment an adequate label as there prescribed or to deliver to the customer in connection with the sale an invoice that imparts all required information. The subsections do not

deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees. Under the plain language of the statute, the offense of misbranding or false invoicing occurs either by reason of failure to attach to a fur product a label or to issue in connection with its sale an invoice, or failure to include on a label which is attached or to show on an invoice which is issued each of the items of information which the statute requires.

Further supporting this interpretation is the circumstance that the particular definitive provisions relating to misbranding and false invoicing appearing in the sub-
[fol. 190] sections mentioned comprise only part of the definitions contained in Section 4 and Section 5(b). Two additional definitions of misbranding appear in other subsections of Section 4, one (subsection 1) relating to deceptive representations on labels, and the other (subsection 3) specifically prohibiting use on labels of animal names other than those provided in the Fur Products Name Guide. Substantially similar supplemental definitions relating to false invoicing appear in subsection (2) of Section 5(b). Subsection (2) of Section 4 and subsection (1) of Section 5(b) evidence a clear legislative design that garments subject to the Act be at all times identified by labels and invoices revealing facts generally relevant to the utility and value of the component fur and continuously identified with a person likewise subject to the Act. Congress' inclusion of these subsections looked not only to combatting deception by insuring disclosure of material facts, but the subsections were also intended to serve as keystones for effective enforcement of companion sections of the Act likewise directed against misbranding and false invoicing and others proscribing false advertising. The requirements specified for an adequate label in subsection (2) of Section 4 are closely interrelated, and the same holds true for those contained in subsection (b)(1) of Section 5 respecting invoices.

For the foregoing reasons, the Commission is of the opinion that in any case in which it is found that the labeling or invoicing requirements of Sections 4(2) or 5(b)(1) of the statute have not been fully complied with, the appropriate conclusion is that the fur products in connection

with which the deficiencies have occurred have been misbranded or falsely invoiced, and that the appropriate order to be issued in correction of the offence is one requiring cessation of the practice, namely, the misbranding or false invoicing by failure to attach proper labels or to issue proper invoices.

While the foregoing considerations are fully controlling on the scope of the order, it should be noted, too, that the Commission is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed in the past. *Hershey Chocolate Corporation* v. *F.T.C.*, [fol. 191] 121 F.2d 968 (C.A. 3, 1941). In addition to proscribing specific deceptive acts, unfair methods reflecting expansion or variation in original basic theme also may be prohibited. *Consumers Sales Corporation* v. *F.T.C.*, 198 F.2d 404 (C.A. 2, 1952).

Considerations of sound administrative policy similarly require that orders be not unduly narrow in their scope when issued in proceedings wherein proof of misbranding or false invoicing has been limited to failure to comply with some, rather than all, of the requirements of subsections 4(2) or 5(b)(1). If compliance with all criteria of the relevant subsection were not required, institution of new proceedings manifestly would be necessitated in challenging subsequent omission not theretofore resorted to but similarly violative of the public policy expressed in the subsection. The multiplicity of actions so resulting patently would not be in the public interest.

The Commission's long established policy with respect to orders covering violations of Section 4(2) of the Wool Products Labeling Act obviates such multiplicity in the enforcement of that statute. Orders thereunder have included prohibitions against failure to disclose on labels all elements of information required by that subsection, even though failure to disclose some elements of information were not involved in various of the cases; and our orders heretofore issued under the Fur Products Labeling Act generally have contained requirements for a disclosure on labels and invoices of all information prescribed by Sections 4(2) and 5(b)(1) of that Act. An example of such an order was that approved by the Court in the *Pelta Furs* case, *supra*.

By issuing an order of the scope indicated, the Commis-
on is not finding directly, or by implication, that respond-
t has engaged in any questionable practices other than
ose of misrepresenting that its advertised prices were
duced from regular and usual prices; and by failing to
bel and invoice its fur products so as to show its name
d address, the name of the animal producing the con-
tuent fur, the fact that certain of its fur products con-
ol. 192] tained bleached, dyed, or otherwise artificially
lored fur, and, in some instances, the country of origin
imported component furs.

These conclusions notwithstanding, it would be erroneous
conclude that the record affords adequate basis for in-
rmed determinations that the respondent's labeling has
ver in any instance reflected departures from the re-
irements of subparagraphs (b), (d) or (e) of Section
2); and neither does the record suffice for similarly in-
rmed determinations respecting certain of the invoicing
quirements prescribed under the subparagraphs of Sec-
n 5(b)(1). Insofar as the fifth numbered conclusion of
w in the initial decision may imply the contrary, modi-
ation of the initial decision in that respect, in addition
modification of the order contained therein, is warranted.

To the extent previously indicated herein, the appeal of
unsel supporting the complaint is deemed well taken,
d our order providing for appropriate modification of
e initial decision is issuing herewith.

Commissioner Tait concurs in the result.

July 5, 1957.

[fol. 193] BEFORE THE FEDERAL TRADE COMMISSION

Excerpts from Transcript of Testimony

ROBERT L. CAMENISCH was thereupon called as a witness for the Commission and, having been first duly sworn, [fol. 194] testified as follows:

Direct examination.

By Mr. Somers:

Q. Will you state your name and address.

A. Robert L. Camenisch; 453 Oak Street, Elmhurst, Illinois.

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

Hearing Examiner Piper: On the record.

By Mr. Somers:

Q. Who do you work for, Mr. Camenisch?

A. The Federal Trade Commission.

Q. How long have you worked for the Federal Trade Commission?

A. About 4½ years.

Q. What division of the Federal Trade Commission do you work for?

A. The Division of Wool, Fur and Flammable Fabrics Division.

Q. How long have you worked in that particular division?

A. A little in excess of 4 years.

Q. What are your duties with the Wool, Fur and Inflammable Fabrics Division?

A. To make investigations under the Wool Products Labeling Act, the Fur Products Labeling Act, and the Flammable Fabrics Act.

Q. How long have you done that type of work for the Commission?

[fol. 195] A. For 4 years.

Q. Were you at any time directed by the head of your division to investigate whether or not Mandel Brothers, the Respondent herein, was complying with the Fur Products Labeling Act?

A. I was.

Q. When was this?

A. This was in 1952 originally, probably in September of 1952.

Q. And did you make a subsequent investigation at the direction of your supervisors?

A. I did.

Q. When was that?

A. That was in 1954; in October, 1954.

Q. And you made this investigation according to the direction of your superiors?

A. I did.

Q. What stores of Mandel Brothers did you investigate?

A. Their State street store in the Loop, the Subway Fur department, and the Fur Salon.

Q. Was that in both the years 1952 and 1954?

A. That is right.

Q. And during those investigations did you make an inspection of the fur products then in the store,—in the Fur Salon and in the Subway store?

A. I did.

[fol. 196] Q. Did you make an investigation of whether or not the labeling thereon complied with the Fur Products Labeling Act and the Rules and Regulations of the Act?

A. I did.

Mr. Somers: I would like to have marked a label entitled: Mandel Brothers, Chicago, as Commission's Exhibit 1.

(The paper referred to was marked Commission's Exhibit 1 for identification.)

Mr. Somers: And as Commission's Exhibit 2, a stock label of Mandel Brothers of Chicago.

(The paper referred to was marked Commission's Exhibit 2 for identification.)

By Mr. Somers:

Q. I will hand you Commission's Exhibit 1 and ask you if you know what that is.

A. This is a specimen of the type of fur content label which was being used by Mandel Brothers on some of its fur products in both departments, in both 1952 and in 1954.

Q. Did you get that during your investigation?

A. This particular specimen I received during the course of the investigation.

Q. Who gave that to you?

A. Mr. Bernstein who is the buyer in the Subway Fur Department, or was; I don't know what he is now.

Q. I hand you Commission's Exhibit 2 and ask you what that is.

[fol. 197] A. This is a Mandel Brothers stock control tag which appears on all the fur products on hand in both departments.

Q. And did you get that during the investigation?

A. I did. I received this also from Mr. Bernstein.

Q. During this investigation of fur products did you examine the labels in both the Fur Salon and the Subway Store?

A. I did.

Q. And were fur products then hanging in both places?

A. Yes.

Q. Did you find any instances of where the labels did not comply with the Fur Products Labeling Act and the rules and regulations promulgated therein?

A. I did.

Q. Will you tell us in what instance they did not comply with it?

A. I will have to refer to notes that I made at the time.

Mr. Blood: I suggest that instead of putting it in the form of did not comply, that the witness should state for the record what he saw; describe what he saw, what they didn't contain.

By Mr. Somers:

Q. Will you state for the record what they didn't contain?

A. First of all, these which I will now attempt to list will be instances in which the animal named as found in the Fur Products Name Guide does not appear on the fur content [fol. 198] label or does not appear in the manner that is specified in the Fur Products Name Guide.

One instance of a Persian lamb jacket with a fur seal trim in which the trim was stated simply as "black seal".

Two instances of Persian lamb paw garments in which the label read: "Dyed black Persian paw".

Do you want me to go on through all of them?

Q. Yes.

A. One instance of a Broadtail Persian lamb coat with a fur seal trim on which the trim was described as "Alaska seal trim."

A fox scarf, I don't know what species of fox, but a fox scarf which was described as "Dyed fox."

One mink scarf which did not contain the name mink at all. It said "Stuart hybrid". Those were in the Subway Fur Department, in 1952.

In the Fur Salon in 1952——

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

Hearing Examiner Piper: On the record.

A. (continued) A Persian lamb jacket described on the label as "Dyed Persian."

Mr. Blood: This is upstairs?

The Witness: In the Fur Salon.

Mr. Blood: I beg your pardon.

The Witness: Yes, that is right.

[fol. 199] A. (continued) And a Persian lamb paw coat described as "Persian body".

A dyed fur seal coat described as "Alaska seal."

A Persian lamb paw coat described as "Persian paw". That was in 1952. Now, in 1954 in the Subway Fur Department——

Mr. Blood: How many instances in the Fur salon were there?

The Witness: I would have to go through them and count them.

Mr. Somers: The record will show.

Mr. Blood. The record will show; three or four.

A. (continued) In 1954, in the Subway Fur Department there was an instance of, I take it, a hair seal jacket described as "Tropical seal."

A mink cape stole or rather two of them, described simply as "Silver Blue", no animal named.

That takes us through that particular category.

And the instances in which the fur origin was not set out or was not set out in the manner described in the Rules and Regulations:

A Broadtail Process Lamb jacket which did not contain any information as to country of origin.

A dyed Persian lamb coat with no fur origin stated. There are two instances of those.

[fol. 200] Two Persian lamb paw coats which did not have the fur origin stated.

A dyed Peschaniki stole with no fur origin stated.

A black fox scarf without origin stated except in adjective form: "Canadian".

A sable scarf with the fur origin set out in adjective form: "Russian"; rather, there were four of those.

Two Peschaniki coats with no fur origin set out.

There were two Canaquito jackets with no fur origin set out.

There were two rabbit coats without fur origin set out.

A dyed Persian lamb side coat with no fur origin.

A dyed marmot coat with no fur origin stated.

A dyed marmot stole with no fur origin.

Two squirrel jackets with the origin set out in adjective form: "Russian".

Then there were 37 marmot coats with the origin set out as "Outer Mongolia".

Mr. McClure: What should they have set out?

The Witness: My information is that that is a part of China, and that this Outer Mongolia is not a country.

A. (continued) I believe that covers that category.

By Mr. Somers:

Q. Before you go into the next item: Those where they had no fur origins set out; are there any of those furs [fol. 201] raised in the United States?

A. Well, my information is that they are not.

Q. None of the furs which you enumerated are raised in the United States?

A. Not commercially raised for the purpose of the fur commerce.

Q. And in the use of the adjective on the label, it was not

set out underneath the origin of Commission's Exhibit 1, is that what you mean?

A. This tag, Commission's Exhibit 1, in 1952 appeared on, I would say, 25 percent of the garments in their stock, and the other garments were tagged with the vendor's tags,—the manufacturer or whoever they obtained the garments from but on the tag which Mandel Brothers put on their garments the word "Origin" appeared alone as it does on Commission's Exhibit 1.

In 1954 there was a lesser number of those tags, Commission's Exhibit 1, used. There were more garments on hand but the supplier's tags were used.

Q. Where you said they used the word describing as an adjective, the country as an adjective, was that set out under the fur origin or was that set out to describe the fur itself, as part of the fur name?

A. It varied. At some times it was down here with the origin and at other times it appeared with the fur itself as, for example: "Russian Sable."

[fol. 202] Q. Are you going ahead now with your statement?

A. This category has to do with the information as to whether the fur is dyed or artificially colored.

A Persian lamb jacket with fur seal trim; the fur seal trim is described as "Black seal", with no reference to dyeing.

A Persian lamb coat with mink trim, the Persian lamb was not described as dyed; it was described as black Persian lamb.

There was one further instance of this same thing: Persian lamb described as black.

Q. Is Persian lamb naturally black?

A. I don't believe that commercially it is ever used in black in its natural state; it is always dyed.

Q. How about the black seal?

A. The fur seal I understand is always dyed; it can't be used commercially in its natural state.

There were five muskrat coats which were simply described as "muskrat", with no reference to having been dyed.

There were four black Persian lamb sides and heads coats which were not described as dyed.

There were four mole cape jackets described as "Tipped".

Hearing Examiner Piper: What has that to do with dyeing?

The Witness: The actual term is "tipped dyeing".

[fol. 203] By Mr. Somers:

Q. You are acquainted with the Fur Products Law and the rules and regulations thereunder; what should this have been instead of "Tipped"?

A. It should have been "Dyed" or "Tip Dyed."

Q. And what did appear?

A. "Tipped".

That is the extent of that particular category. Abbreviation of the required information on the label I found in the following instances; on a broadtail processed lamb jacket, the word broadtail was abbreviated: "Bdtl".

Q. What are you in now?

A. This is in 1952, in the Subway Fur Department.

Persian lamb coats, 2, with "Southwest Africa", the "Southwest" appreviated: "SW".

Three mink jackets in which the word "Canada" in the fur origin was abbreviated: "Can.".

In 1952, in the Fur Salon, I see no examples of that category.

In the Subway Fur Department in 1954, dyed fitch garments in which fur origin was a*gg*reviated: "F.O."

A dyed muskrat jacket was abbreviated; the word "muskrat" was abbreviated: "Msk st".

A Persian lamb side coat in which the word "Afghanistan" was abbreviated: "Afghan".

[fol. 204] That is the extent of that category.

Now, required information appeared on the face of the label required mixed with required information, we have the following instances——

Mr. Blood: Subway, in 1952?

The Witness: That is right; Subway, in 1952.

A. (continued) On Persian lamb coats with mink trim, two garments contained the words "American Silver Blue mink trim".

Two Persian lamb paw coats contained information "Dyed black Persian paw".

A dyed broadtail Persian lamb coat contained in addition to this required information the word "black".

A black dyed Persian lamb with fur seal trim appeared as "black dyed Persian lamb".

Two dyed rabbit jackets contained in addition to the required information the words "Blue" and "Wintergreen".

A dyed white fox scarf was described on the label as "honey beige dyed white fox".

A dyed red fox boa was described on the label as "red fox died black".

Eleven natural Persian lamb coats contained in addition to the required information the word "gray".

Two mink cape stoles in addition to the required information contained the words "Silver blue".

One dyed Guanaquito jacket was described "blonde [fol. 205] dyed".

In the Fur Salon at that time there were two mink stoles which contained the following information: "Natural tipped wild mink cape stole".

Three instances of squirrel coats described as "gray squirrel".

Three muskrat coats described in addition to the required information as "Silver blue".

Six more natural Persian lamb coats described as "Gray Persian lamb".

Eight Persian lamb side coats, described as "black dyed Persian lamb".

Four dyed muskrat capes described as "Breath of Spring", in addition to the required information.

In 1954 in the Subway Fur Department, three natural Persian lamb coats described as "natural gray Persian lamb".

Two Persian lamb coats with mink trim in which the mink was described by color.

Two squirrel jackets described as "honey colored dyed Russian squirrel".

Two muskrat jackets described as "Hollander forest brown *shde* dyed southern muskrat backs".

By Mr. Somers:

Q. I think those are enough instances of that, Mr. Camenisch.

A. Then the required information was set out in hand-[fol. 206] writing in a number of instances.

On a dyed muskrat jacket——

Mr. Blood: Where are we now?

The Witness: This is back in 1952, in the Subway Fur Department.

A. (continued) On two Persian lamb coats with mink trim; on six Persian lamb coats——

By Mr. Somers:

Q. You are speaking now of handwriting?

A. Of handwriting.

Q. The information set out on the labels was in handwriting?

A. That is right. Two Persian lamb paw coats; a broadtail Persian lamb coat; a Persian lamb coat with fur seal trim; a dyed white fox scarf; a natural blue fox scarf; a black fox scarf; three mink scarv-s; two Japanese mink scarv-s; one Kolinski scarf; one beaver coat; two Guaranquito coats; three raccoon coats.

In the Fur Salon in 1952, I found two raccoon coats; one Persian lamb coat with mink trim; 1 Persian lamb coat; three marmot coats; two muskrat coats; ten rabbit coats.

Q. You are still speaking of the Fur Salon in 1952?

A. No, the last two items have been in the Subway Fur Department.

There were five rabbit coats with mink trim which contained handwriting; nine mouton processed lamb coats; two [fol. 207] natural Persian lamb coats; two dyed otter jackets; two Persian lamb side coats; three dyed marmot stoles; five dyed muskrat capes.

Q. These are all examples of the handwriting?

A. Of the handwriting in 1952, yes.

Q. In the Fur Salon?

A. This is in the Subway Fur Department.

Then there were Persian lamb paw coats, ten. Eleven dyed marmot coats.

In the Subway Fur Department in 1954; two squirrel jackets; two muskrat jackets; seven raccoon flank coats; two Persian lamb side coats; four mole jackets; 1 hair-seal jacket; two squirrel jackets.

In the Fur Salon in 1954: One white fox jacket or scarf; 1 blue fox and one red fox scarf; one natural Persian lamb coat; and that is the extent of the labeling deficiencies as I found them in these inspections.

Q. Did you find any deficiency in regard to the setting out, that the fur product was made out of paws, tails or bellies?

A. I don't find any reference to that in my notes.

Q. Did you find any labels where the name or other identification issued and registered by the Commission was not set out thereon, of a manufactured product?

A. No; on Exhibit 1, the tag that Mandel's set out on fur products, their name, you will see, is printed thereon.

[fol. 208] Q. I will hand you Exhibit 1 and ask you to note the deficiency in that.

A. As it appears on the face of the label?

Q. Yes.

A. Well, as it is set out here, the word "Origin" appears by itself and the term as described in the rules and regulations would be "Fur Origin".

Q. In your investigation is Mandel Brothers the full name of the respondent?

A. The name of the respondent as I recall it and as far as I am informed, is Mandel Brothers, Inc., and in the label it appears simply: Mandel Brothers, Chicago.

Q. Did you find any fur products that were composed of used fur that did not so set out on the label?

A. No, I did not.

Mr. Somers: If your honor please, I would like to have marked as Commission's Exhibit 3, C. P. Fur Co.'s Invoice 703.

(The paper referred to was marked Commission's Exhibit 3 for identification.)

Mr. Somers: I would like to have marked Doumas and Parlitsis Invoice 1094, marked as Commission's Exhibit 4.

(The paper referred to was marked Commission's Exhibit 4 for identification.)

Mr. Somers: These are photostatic copies I would [fol. 209] like to have photostatic copies of Doumas and Parlitsis invoice 1094——

Hearing Examiner Piper: You just had that number.

Mr. Somers: This is a further invoice of the same one.

Hearing Examiner Piper: The same name and number?

Mr. Somers: The same name and number. Evidently they didn't have room enough on the one to put the entire shipment. I would like that marked as Commission's Exhibit 5.

(The paper referred to was marked Commission's Exhibit 5. for identification.)

Mr. Somers: As Exhibit 6 the National Fur Coporation invoice No. 48975.

(The paper referred to was marked Commission's Exhibit 6 for identification.)

Mr. Blood: These invoices are incoming to Mandel Brothers from shippers outside the state?

Mr. Somers: From shippers outside of the state.

Mr. Blood: I think that is in the pleadings.

Mr. Somers: I thought you denied practically all that is in the complaint.

Hearing Examiner Piper: Not that.

Mr. Blood: I was trying to shorten the record.

Hearing Examiner Piper: I think you denied that.

Mr. Somers: Yes, you denied the whole paragraph.

Mr. Blood: I think you are right. I think we said [fol. 210] we didn't know. I will admit it now.

Hearing Examiner Piper: Admit what?

Mr. Blood: We admit that there were furs and fur products received by Mandel Brothers, the respondent, which were shipped to them from outside the state of Illinois if that is what they seek to prove.

Mr. Somers: Shipped and received in commerce, as commerce is defined in the Fair Labor Products Act.

Mr. Blood: I will admit they were shipped from outside the state of Illinois, as a geographical matter.

Mr. Somers: And received by Mandel Brothers.

Mr. Blood: That is right.

Hearing Examiner Piper: I will treat that as a stipulation and will accept the stipulation.

Mr. Somers: Then the reporter can strike off all those exhibits.

Hearing Examiner Piper: You haven't offered them?

Mr. Somers: No.

Hearing Examiner Piper: Nor have you offered Exhibits 1 and 2.

Mr. Somers: No. I thought we would mark them all and offer them all at once, if you have no objection.

Mr. Blood: No; I have no objection.

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

fol. 211] Hearing Examiner Piper: On the record.

Mr. Somers: 3, 4, 5 and 6 are withdrawn.

(The documents marked as Commission's Exhibits 3, 4, and 6 were withdrawn.)

Mr. Somers: If your honor please, I would like to have marked as Commission's Exhibit 3, a facsimile of the sales slip retained by Mandel Brothers after the sale of a fur product.

(The paper referred to was marked Commission's Exhibit 3 for identification.)

Mr. Somers: I would like to have sales slip 33988-4 marked as Exhibit 4.

(The paper referred to was marked Commission's Exhibit 4 for identification.)

Mr. Somers: I would like to have sales slip 33987-7 marked as Exhibit 5.

(The paper referred to was marked Commission's Exhibit 5 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33985-1 marked Commission's Exhibit 6.

(The paper referred to was marked Commission's Exhibit 6 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33975-21 marked as Commission's Exhibit 7.

(The paper referred to was marked Commission's Exhibit 7 for identification.)

[fol. 212] Mr. Somers: I would like to have the facsimile of sales slip 33990-16 marked as Commission's Exhibit 8.

(The paper referred to was marked Commission's Exhibit 8 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33979-2 marked as Commission's Exhibit 9.

(The paper referred to was marked Commission's Exhibit 9 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33988-17 marked as Commission's Exhibit 10.

(The paper referred to was marked Commission's Exhibit 10 for identification.)

Mr. Somers: I would like the facsimile of sales slip 33973-16 marked as Commission's Exhibit 11.

(The paper referred to was marked Commission's Exhibit 11 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33986-7 marked as Commission's Exhibit 12.

(The paper referred to was marked Commission's Exhibit 12 for identification.)

Mr. Somers: I would like to have the facsimile of 33988-28 marked as Commission's Exhibit 13.

(The paper referred to was marked Commission's Exhibit 13 for identification.)

Mr. Somers: I would like the facsimile of sales slip——

[fol. 213] (The paper referred to was marked Commission's Exhibit 14 for identification.)

Mr. Somers: I would like the facsimile of sales slip 33985-20 marked for identification as Commission's Exhibit 15.

(The paper referred to was marked Commission's Exhibit 15 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 32174-8 marked as Commission's Exhibit 16.

(The paper referred to was marked Commission's Exhibit 16 for identification.)

Mr. Somers: And the facsimile of sales slip 33990-27 marked as Commission's Exhibit 17.

(The paper referred to was marked Commission's Exhibit 17 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33981-1 marked as Commission's Exhibit 18.

(The paper referred to was marked Commission's Exhibit 18 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33973-11 marked as Commission's Exhibit 19.

(The paper referred to was marked Commission's Exhibit 19 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33986-17 marked as Commission's Exhibit 20.

(The paper referred to was marked Commission's Exhibit 20 for identification.)

[fol. 214] Mr. Somers: And the facsimile of sales slip 16246-18 to be marked as Commission's Exhibit 21.

(The paper referred to was marked Commission's Exhibit 21 for identification.)

Mr. Somers: And the facsimile of sales slip 16244-12 marked as Commission's Exhibit 22.

(The paper referred to was marked Commission's Exhibit 22 for identification.)

By Mr. Somers:

Q. I will hand you Commission's Exhibit 3 and ask you what that is.

A. This is a facsimile which I prepared to indicate the form of the sales invoice which is given to the customer by Mandel Brothers in the sale of fur products.

Q. And that was copied by you from one of their original forms?

A. That is right. This was copied from the book of sales slips which was currently being used at that time in the department.

Q. Where did you get that book?

A. Mr. Bernstein supplied it to me,—the buyer in the Subway Fur Department.

Q. I will now hand you Commission's Exhibit 4 through and including Commission's Exhibit 22 and ask you what those are?

A. These are facsimiles of tissues, that is, the tissue copy [fol. 215] of sales slips recording the sale of fur products in the fur departments which are kept on file in the fur departments.

These facsimiles were prepared by me from notes which I made from the tissues on file, actually on file under the departments.

Q. Why didn't you take photostatic copies of those?

A. I requested photostatic copies of the tissues from, I believe it is the comptroller of this store and Mr. Krackenberger I think is his name, and he said he didn't believe they would photostat,—that the tissues were too faint to give an image, so he suggested that I copy the material from the tissues.

Q. Do those facsimiles contain all the information that was on the sales slips which they represent?

A. Yes, they do.

Q. In the same manner and in the same form?

A. They do.

Q. Except it is your handwriting instead of the sales person's handwriting?

A. That is right.

Mr. Somers: I will offer them.

Hearing Examiner Piper: They were in handwriting, the original sales slips?

The Witness: Yes.

Hearing Examiner Piper: Made out by the sales people?

The Witness: Yes; made out by the sales people at the time of the sale, made out in handwriting.

[fol. 216] Mr. Somers: I will offer Commission's Exhibits 1 through 22 into evidence.

Hearing Examiner Piper: Have you any objection?

Mr. Blood: Yes, I have. He lumped with his offer, 1 and 2, which were the other exhibits previously identified, those two little labels.

Hearing Examiner Piper: Let us treat those separately.

Mr. Blood: I haven't any objection as to the form of these exhibits, the fact that they are facsimiles.

Hearing Examiner Piper: Let us dispose of 1 and 2, first; they are not facsimiles, are they?

Mr. Blood: No.

Hearing Examiner Piper: Do you have any objection to 1 and 2?

Mr. Blood: Only that under the pleadings, under the Complaint filed here, that, the subject matter that he has been examining this witness upon was not specified in any way.

I know you are going to meet that, as I understand it by your note having to go ahead, but we were not put on notice about these alleged violations of the regulations.

Hearing Examiner Piper: Objection overruled. As to Exhibits 1 and 2, they are received.

(The papers referred to, heretofore marked for identification Commission's Exhibits 1 and 2, were received in evidence.)

[fol. 217] Hearing Examiner Piper: Do you have a different objection to the others?

Mr. Blood: No; the same objection. I was trying to make clear to him that I am not objecting on any technical grounds.

Hearing Examiner Piper: Same ruling; Commission's Exhibits 3 through 22 are received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 3 through 22, both inclusive, were received in evidence.)

[fol. 218] Q. I think that you testified about these sales slips, that they were on thin tissue and that it was not practicable to have them photostated and therefore you made facsimiles; is that true of all of them? I wasn't clear about that. Some of them don't look like facsimiles. I am trying to make that clear in my own mind.

A. In 1952 Mr. Krackenberger was of the opinion that [fol. 219] these tissues would not photostat and he suggested

I make these facsimiles, that he would not attempt to photostat these tissues. In 1954 they agreed to photostat them and they did produce them.

Q. So the ones that were the 1952 sales slips have been reproduced by you in your own handwriting?

A. Yes, in my own handwriting.

Q. And in 1954 the sales slips were photostated?

A. Yes.

[fol. 220] BERNARD B. BERNSTEIN was thereupon called as a witness for the Respondent, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Blood:

Q. Please state your name.

A. Bernard B. Bernstein.

Q. Where do you live?

A. 3017 Leland Avenue, Chicago 25, Illinois.

Q. Where is your present occupation?

A. Fur buyer at Mandel Brothers, Basement Furs.

[fol. 221] Q. When garments come in from manufacturers, do they sometimes already have a label on with this required information?

A. They do.

Q. Do you check that?

A. I check that and if they haven't got it we put our own ticket on which has the required information.

Q. I show you Respondent's Exhibit 1.

(The paper referred to was marked Respondent's Exhibit No. 1, for identification.)

A. Yes.

By Mr. Blood:

Q. I ask you to state what that is.

A. This is the ticket that is required by the Labeling Act showing that this particular garment was a mink and the fur origin is U.S.A., and of course, the register number, 2511.

Q. And the item number?

A. The item number is 1080. This was bought in a lot
so.

Q. Was this particular label taken from a garment
tually available for sale?

A. On the floor; that is right, yes.

Q. As I understood your testimony, if for any reason
ou feel that the information that the manufacturer has
laced there is not correct or is inadequate, that you
rrect it?

A. We put a new ticket on it, yes.

ol. 222] Mr. Blood: I will offer Respondent's Exhibit 1.

Mr. Somers: I would like to know the relevancy of it.

Mr. Blood: The relevancy of it is what we are actually
oing, and what we are trying to do.

Mr. Somers: That is what you are doing as of now.
ou are not holding that this is the same label that was
sed in 1954 or 1952?

Mr. Blood: I will get to that in just a minute. I am
aying this is an example of what he does; this is a label
at came in from the manufacturer, one that is currently
sed and he has told what he does with respect to checking
e accuracy of these labels and if he finds them deficient
any way, he makes the correction before the garment
offered for sale.

Hearing Examiner Piper: Is that the way it came from
e manufacturer?

Mr. Blood: Yes; on most of them, if they are adequate,
ey don't put a label on; they just use the label that
me from the manufacturer.

The Witness: That is the information that is required.

Hearing Examiner Piper: Well, I understand Mr. Som-
s' objection is on the ground of relevancy. This doesn't
nd to prove anything one way or the other, so far as the
omplaint is concerned.

Mr. Blood: All right, if you are going to get that
ol. 223] technical.

Mr. Somers: No, I am not getting technical.

By Mr. Blood:

Q. Did you have labels of this character in 1954?

A. In 1954 we did.

Q. In 1952, which was one month after the Act was en-
cted, you didn't have those?

I make these facsimiles, that he would not attempt to photostat these tissues. In 1954 they agreed to photostat them and they did produce them.

Q. So the ones that were the 1952 sales slips have been reproduced by you in your own handwriting?

A. Yes, in my own handwriting.

Q. And in 1954 the sales slips were photostated?

A. Yes.

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By Mr. Blood:

Q. Please state your name.

A. Bernard B. Bernstein.

Q. Where do you live?

A. 3017 Leland Avenue, Chicago 25, Illinois.

Q. Where is your present occupation?

A. Fur buyer at Mandel Brothers, Basement Furs.

[fol. 221] Q. When garments come in from manufacturers, do they sometimes already have a label on with this required information?

A. They do.

Q. Do you check that?

A. I check that and if they haven't got it we put our own ticket on which has the required information.

Q. I show you Respondent's Exhibit 1.

(The paper referred to was marked Respondent's Exhibit No. 1, for identification.)

A. Yes.

By Mr. Blood:

Q. I ask you to state what that is.

A. This is the ticket that is required by the Labeling Act showing that this particular garment was a mink and the fur origin is U.S.A., and of course, the register number, 2511.

Q. And the item number?

A. The item number is 1080. This was bought in a lot also.

Q. Was this particular label taken from a garment actually available for sale?

A. On the floor; that is right, yes.

Q. As I understood your testimony, if for any reason you feel that the information that the manufacturer has placed there is not correct or is inadequate, that you correct it?

A. We put a new ticket on it, yes.

[fol. 222] Mr. Blood: I will offer Respondent's Exhibit 1.

Mr. Somers: I would like to know the relevancy of it.

Mr. Blood: The relevancy of it is what we are actually doing, and what we are trying to do.

Mr. Somers: That is what you are doing as of now. You are not holding that this is the same label that was used in 1954 or 1952?

Mr. Blood: I will get to that in just a minute. I am saying this is an example of what he does; this is a label that came in from the manufacturer, one that is currently used and he has told what he does with respect to checking the accuracy of these labels and if he finds them deficient in any way, he makes the correction before the garment is offered for sale.

Hearing Examiner Piper: Is that the way it came from the manufacturer?

Mr. Blood: Yes; on most of them, if they are adequate, they don't put a label on; they just use the label that came from the manufacturer.

The Witness: That is the information that is required.

Hearing Examiner Piper: Well, I understand Mr. Somers' objection is on the ground of relevancy. This doesn't tend to prove anything one way or the other, so far as the Complaint is concerned.

Mr. Blood: All right, if you are going to get that [fol. 223] technical.

Mr. Somers: No, I am not getting technical.

By Mr. Blood:

Q. Did you have labels of this character in 1954?

A. In 1954 we did.

Q. In 1952, which was one month after the Act was enacted, you didn't have those?

A. Yes, that is correct. We didn't, then.
Q. And you have them today?
A. 1953 is when we started putting them on.
Q. 1953?
A. Yes.

Mr. Blood: Mr. Examiner, my point on this line of inquiry is this: This was a new statute and a new set of regulations and the time they made the first regulations here was only a few weeks after it had gone into effect. There have been some deficiencies. The testimony is they have been trying to comply. They have been working on it and by the time of 1954 this label was commonly used and we are entitled to introduce it.

Hearing Examiner Piper: I don't remember what was introduced in the last hearing. Were there labels introduced?

Mr. Blood: Yes.

Hearing Examiner Piper: Were there labels introduced which the Commission alleges didn't contain the records [fol. 224] they should?

Mr. Blood: The labels themselves were all right. Mr. Camenisch pointed out certain information on the label which he thought did not comply, in certain instances.

Hearing Examiner Piper: Was that just in 1952 or were there some in 1954?

Mr. Somers: 1952 and 1954.

Hearing Examiner Piper: In both cases there were some labels introduced. That is what I am trying to get at.

Mr. Somers: They used the same label in 1952 and 1954 except in 1954 they didn't have the label item. This is a manufacturer's label and this is Mandel Brothers'.

The Witness: When this is off, we put in one of these tickets in order to have a label.

Hearing Examiner Piper: When you said "one of these tickets" you are referring to Respondent's Exhibit 1 for identification.

Mr. Blood: Yes.

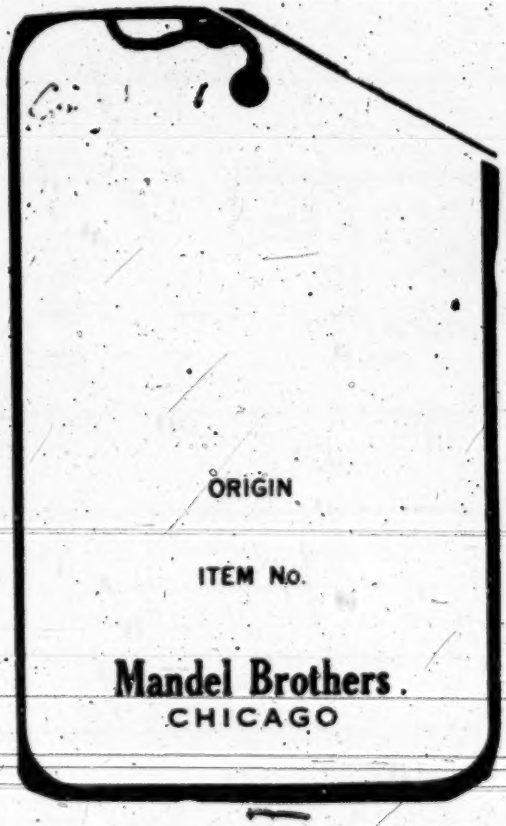
The Witness: Yes.

Hearing Examiner Piper: That is the type of label you attach if it is not one of the labels of the respondent?

The Witness: Yes.

(Here follow 2 photolithographs, side folios 225 and 226)

[fol. 225] COMMISSION'S EXHIBIT No. 1



[fol. 226] COMMISSION'S EXHIBIT No. 3

MANDEL BROTHERS

(NUMBER)

DEPT	CLERK	HOW SOLD	MO.	DAY	Enclosures No. Val.

SEND TO

ADDRESS APT. or HSE.

CITY ZONE STATE Near or care of

Charge to Identification No.

Address City

Quan.	Class		Unit Pr.	Amt
		(NUMBER)		

DEPT	CLERK	HOW SOLD	MO.	DAY	No. Val.

Deposit Cash Tube

(NUMBER)

[fol. 227] COMMISSION'S EXHIBIT No. 4

FEDERAL TRADE COMMISSION

Docket No. 6434

33988-4

14

110 GS 856 Budg 10 6

R. A. Nelson, 418 E. Hillside, Barrington, Ill.

1 Natl Ranch Rump 9/K 2964 Mink Coat		125.00
1 Mink Side Coat 9/K 2909		125.00
		250.00
	FT	50.00
	AC	2.50
		302.50
110 GS—856 Budg 10 6		302.50

[fol. 228] COMMISSION'S EXHIBIT No. 12

FEDERAL TRADE COMMISSION

Docket No. 6434

33986-7

110 110-20 W. C. 10 6

J. Keesee, 241 Dyer Blvd., Hammond, Ind.
Will Call

1	43/8	2857	Stole		125.00
				Fed	25.00
					150.00
				Dep.	15.00
					135.00

Will Call

No. 65668

Will Call

110 110 20 W.C. 10 6 150.00

(Here follow 2 photolithographs, side folios 229 and 230)

[fol. 229] COMMISSION'S EXHIBIT No. 53

CHARGE TO: Mrs C Dittmann — IDENTIFICATION NO.
4224 Arnold
Sylvan Glen

QUAN.	CLASS	ARTICLE	PRICE	AMOUNT
1		Lloyd otten		
		304 Coat	2 44	00
		- 3rd Sat		24 40
		WILL CALL CJ		4 88
		P.O. 4491	2 73	28
		- WILL CALL BC		30 00
		$04396	2 43	28

IF FURNITURE DELIVERY, INDICATE BELOW

ROUTE NO.	DEL. DAY	DEL. DATE	AM'T OF SALE
			36337·33

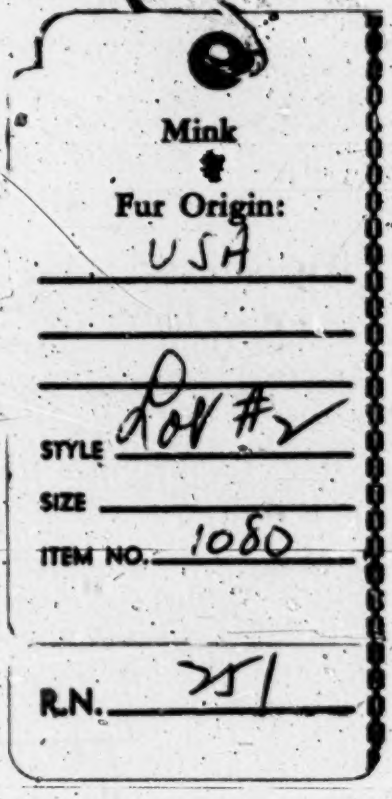
DEPT.	SOLD BY	NO. DAY	HOW SOLD	AMT. OF SALE
10	10·13	10-7	WC	

MANDEL BROTHERS
STate 2-1000

AMT. RECEIVED	DEPOSIT
	44

[fol. 230] RESPONDENT'S EXHIBIT No. 1

[Reverse]



[Face]

[fol. 231] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

SEPTEMBER TERM 1957—January Session 1958

MANDEL BROTHERS, INC., a corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

On Petition to Set Aside an Order of the Federal Trade Commission.

OPINION—April 1, 1958

Before DUFFY, *Chief Judge*, SCHNACKENBERG and PARKINSON, *Circuit Judges*.

PARKINSON, *Circuit Judge*. The petitioner, Mandel Brothers, Inc., is a Delaware corporation. It owns and operates a large department store in Chicago, Illinois with annual sales of approximately $32,000,000. It has two fur departments, one on the fifth floor and the other in the basement.

The petitioner is here seeking to set aside a cease and desist order entered July 5, 1957 under the Fur Products Labeling Act, Title 15 U.S.C.A. § 69 *et seq.* by the respondent Federal Trade Commission. There are five contested issues.

The first is whether the petitioner's activities constitute interstate commerce subject to the jurisdiction of the Federal Trade Commission.

[fol. 232] The parties stipulated that furs and fur products sold by petitioner were shipped to and received by it from outside the the State of Illinois. Petitioner's fur department managers testified that they went to New York City ten or twelve times a year to buy furs for their departments and that most of the furs that are sold in the petitioner's store are bought there. There was also evidence that the petitioner advertised in the *Chicago Tribune*, the *Chicago Sun-Times* and the *Chicago American*, all of

which, as stipulated by the parties, have interstate circulation and that furs were sold to non-residents of Illinois and sent to an out of state address. The witness Hill, manager of petitioner's fifth floor fur department, testified that Commission's Exhibit 12, a sales slip, had no Illinois sales tax thereon and therefore the goods would have to be delivered outside the State of Illinois. Commission's Exhibits 19 and 20 also show similar sales to residents of Indiana upon which no Illinois sales tax had been charged. Accordingly there was ample evidence in the record from which the Commission could find that the petitioner was engaged in interstate commerce. *DeGorter* v. *Federal Trade Commission*, 9 Cir., 1957, 244 F. 2d 270. The case of *Federal Trade Commission* v. *Bunte Brothers*, 1941, 312 U.S. 349, cited by the petitioner is inapposite in that Bunte Brothers' sales were made exclusively in Illinois.

The second issue is whether the Commission's Rule 44 under the Act is a valid exercise of the authority delegated to the Commission.

Section 8 (a) (1) (b) of the Act authorizes the Commission to prescribe, *inter alia*, such rules and regulations as may be necessary and proper for purposes of the administration and enforcement of the Act.

Section 5 (a) (5) provides:

> "For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement * * * which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur * * * contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur; * * *."

[fol. 233] We agree with the Ninth Circuit in *Degorter* when it said, "the intention was to reach all *misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion."

The Commission found that certain fur products sold by the petitioner for $244 were the same ones advertised in the *Chicago Tribune* on October 2, 1954 as "Usually $299 to $399" the net effect of which was to mislead and deceive purchasers as to the amount of savings to be realized. We believe that finding is supported by substantial evidence. Mandel called its manager of the fifth floor fur department as a witness but made no attempt to prove these garments were usually sold at $299 to $399. Petitioner's contention that the issue here is not the regular and usual price of the specific garments sold by Mandel but the regular and usual price of similar or comparable garments fails inasmuch as the customer would make no such distinction. Moreover, there is no evidence in this record that the regular and usual price of similar or comparable garments was $299 to $399.

The third issue is whether the evidence as to labeling, invoicing, advertising and record-keeping is such as to warrant and support the Commission's cease and desist order.

What we have held as to advertising is dispositive of that question. The evidence of Mandel's fur salon manager that Mandel had no definite records showing the garments that had been sold at the advertised price gives adequate support to the order of the Commission as to inadequate record-keeping.

As to the labeling the Hearing Examiner found that Mandel had not violated subdivisions (B), (D) and (E) of §4 (2) of the Act and his cease and desist order did not include these subdivisions. The Commission, on appeal, specifically found that there was no evidence as to violations of these same subdivisions but did include them in its cease and desist order. The Supreme Court in its opinion [fol. 234] in *Federal Trade Commission* v. *Ruberoid Co.*, 1952, 343 U.S. 470, 473 held that, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" and also in *Federal Trade Commission* v. *National Lead Co.*, 1957, 352 U.S. 419, 431 "that those caught violating the Act must expect some fencing in." However, here the Commission specifically found that there was no evidence of any violation of subdivisions (B), (D) and (E) of §4 (2). We find no difficulty in subscribing to the doctrine that a cease

and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do.

The petitioner concedes that it has violated subdivisions (A), (C) and (F) of §4 (2) and Rules 4 and 29 promulgated under §8 (a) (2) (b). It attempts to excuse its violations upon the ground that they are technical and trivial. If such an excuse were valid the enforcement of the Act would be virtually impossible. In this we find no merit.

The Commission contends that when Mandel failed to place certain information upon the sales slip given to the consumer that constituted a violation of §3(b) of the Act. Petitioner argues that a sales slip is not an "invoice" within the meaning of the Act. The word "invoice" has an accepted meaning in the commercial world. It is a written account or itemized statement of merchandise shipped or sent to a purchaser or consignee with the quantity, value or prices and charges set forth. However, the Fur Products Labeling Act defines the term and we must look to that definition for its meaning.

Section 2 (f) of the Act defines "invoice" as:

> "a written account, memorandum, list, or catalog, *which is issued in connection with any commercial dealing* in fur products or furs, and describes the particulars of any fur products or furs transported or delivered to a purchaser, * * * or any *other* person *who is engaged in dealing commercially in fur products or furs.*" (our emphasis)

[fol. 235] This statutory definition is plain and unambiguous and to come within its terms an "invoice" must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially.* Under no circumstances is a sales slip given to a customer by a retailer a written account, memorandum, list, or catalog issued in connection with a commercial dealing. An invoice is not brought down to the retail level by this section.

The respondent attempts to buttress its position with excerpts from hearings before a congressional committee. However, when the language used in a statute is clear and unambiguous its legislative history cannot control the interpretation as "such aids are only admissible to solve doubt and not to create it." *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 1922, 257 U.S. 563, 589. "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms." *United States* v. *Shreveport Grain & Elevator Co.*, 1932, 287 U.S. 77, 83. There is no doubt as to the meaning of "invoice" as defined by the statute. It is clearly not a sales slip at the retailer-customer level.

We agree with the Commission that a limiting clause is to be restrained to the last antecedent unless the subject requires a different construction. If the last antecedent were "any person" instead of "any other person" the word "purchaser" might not be limited to one engaged in dealing commercially in fur products or furs. However, when the statute says purchasers or any *other* person who is so engaged the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs.

The fourth issue is whether the Commission, having found that there was no evidence of certain violations, properly included prohibition of those violations in its cease and desist order. As the order must be modified and those portions deleted therefrom pursuant to our [fol. 236] determination of the third issue consideration of this issue is no longer necessary.

The fifth issue is whether the Commission properly imposed its cease and desist order on Mandel's officers, representatives, agents and employees when only Mandel itself was named in the complaint.

The petitioner is a corporation. A corporation can act only through its agents. This rule of law is so elementary that citation of authorities is certainly not required.

We did hold in *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 7 Cir., 1951, 192 F. 2d 535, 540 that the Commission was without authority to include officers, agents, representatives and employees in its cease and desist order. We did make a distinction in *Anchor Serum Company* v. *Federal Trade Commission*, 7 Cir., 1954, 217 F. 2d 867, 874. We have given careful consideration to the question and have come to the conclusion that we were in error in *Reynolds*. Accordingly so much of our decision therein as pertains to this question is overruled.

We hold that the Commission did have the power to include in its cease and desist order Mandel's officers, representatives, agents and employees.

The cease and desist order here under review is hereby ordered modified by deleting therefrom subdivisions (b), (d) and (e) of subsection 1 of A and all of B.

The order as modified is AFFIRMED.

[fol. 237] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

MANDEL BROTHERS, INC., a corporation, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

Petition to Set Aside an Order of the Federal Trade Commission

JUDGMENT—April 1, 1958

This cause came to be heard on the petition to review and set aside an order of the Federal Trade Commission, and the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjusted by this Court that the cease and desist order here under review be modified deleting therefrom provisions (b), (d), and (e) of subsection 1 of A and all of B, and the said order as modified is affirmed.

[fol. 238] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—May 1, 1958

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 239] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

MANDEL BROTHERS, INC., a corporation, Petitioner;

v.

FEDERAL TRADE COMMISSION, Respondent

FINAL DECREE—May 8, 1958

Mandel Brothers, Inc., a corporation, petitioner herein, having filed in this Court on September 10, 1957, its petition to set aside an order to cease and desist issued against it on July 5, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled In the Matter of Mandel Brothers, Inc., a corporation, Docket No. 6434; and the petition having been heard by this Court on briefs and oral argument; and this Court having thereafter fully considered the matter and rendered its decision on April 1, 1958, whereby it modified the Commission's order by deleting therefrom subdivisions (b), (d), and (e) of subsection 1 of A and all of B thereof, and having affirmed the order as so modified;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that petitioner, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which

has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(c) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products:

(a) Required information in abbreviated form or in handwriting;

(b) Non-required information mingled with required information.

[fol. 240] B. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which petitioner has usually and customarily sold such products in the recent regular course of its business;

C. Making pricing claims or representations of the type referred to in Paragraph B above, unless there is maintained by petitioner full and adequate records disclosing the facts upon which such claims or representations are based.

And It Is Further Ordered, Adjudged and Decreed that within ninety days after the entry of this Decree petitioner shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this decree.

Without prejudice to the right of the United States as provided in section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist, as modified and hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance therewith in every respect and to prevent evasion thereof.

By the Court: (S.) F. Ryan Duffy, Chief Judge. Elmer J. Schnackenberg, W. Lynn Parkinson, United States Circuit Judges.

Entered: May 8, 1958.

[fol. 241] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

To Petitioner's Brief

Statement Pursuant to Rule 16(b) of the Rules of the United States Court of Appeals for the Seventh Circuit

The proceeding below was initiated by the action of the Federal Trade Commission in issuing its complaint against Mandel Brothers, Inc., a corporation, respondent. That proceeding was styled and captioned "In the Matter of Mandel Brothers, Inc., a corporation. Docket No. 6434." The complaint was issued on October 27, 1955, and was served on November 4, 1955. Further pertinent proceedings were as follows:

[fol. 242] Dec. 27, 1955. Motion by respondent to strike complaint or, in the alternative, for a more definite statement.

Jan. 3, 1956. Answer by counsel supporting complaint, to above motion.

Jan. 4, 1956. Hearing Examiner's order denying above motion.

Jan. 11, 1956. Answer filed by respondent.

Apr. 12, 1956. Initial hearing.

June 7, 1956. Further and final hearing.

Oct 9, 1956. Hearing Examiner's initial decision and order to cease and desist, served Oct. 18, 1956.

Oct. 23, 1956. Notice of appeal to the Commission from Hearing Examiner's initial decision, by respondent.

Oct. 24, 1956. Notice of appeal to the Commission from Hearing Examiner's initial decision, by counsel supporting complaint.

Jan. 31, 1957. Argument before the Commission, on appeals.

July 5, 1957. Final order of the Commission, with opinion of the Commission.

July 15, 1957. Final order and opinion of the Commission served.

Sep. 10, 1957. Petition to review filed by Mandel Brothers, Inc.

[fol. 243] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 25, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30th, 1958.

Tom Clark, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of June, 1958.

[fol. 244] Clerk's Certificate to Foregoing Transcript (Omitted in Printing.)

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United tes Court of Appeals for the Seventh Circuit is granted, l the case is transferred to the summary calendar.
And it is further ordered that the duly certified copy of transcript of the proceedings below which accompanied petition shall be treated as though filed in response to h writ.

U. S. GOVERNMENT PRINTING OFFICE: 1958